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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 680

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE WHEELING & LAKE ERIE RAILWAY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

FILED FEBRUARY 21, 1930

(34,811)

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[fols. 1-4] **IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION**

In Equity. No. 3075

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, Pittsburgh, Pennsylvania, Complainant,

vs.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, 1881 Union Trust Bldg., Cleveland, Ohio; The Cleveland Union Terminals Company, Terminal Tower Bldg., Cleveland, Ohio; The Cleveland Terminals Building Company, Terminal Tower Bldg., Cleveland, Ohio; Erie Railroad Company, Terminal Tower Bldg., Cleveland, Ohio; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, West Ninth Street, Cleveland, Ohio; The United States of America; The Interstate Commerce Commission, Defendants

AMENDED BILL OF COMPLAINT—Filed Aug. 21, 1929

To the Honorable Paul Jones, Samuel H. West, George P. Hahn, and John M. Killits, Judges of said Court, sitting in equity:

I

Your complainant, The Pittsburgh & West Virginia Railway Company, brings this proceeding in equity against [fol. 5] The Wheeling & Lake Erie Railway Company (hereinafter referred to as "Wheeling"), for the purpose of enjoining, preventing and restraining Wheeling from

(a) abandoning its Ontario Street Passenger Station Site, so-called, located in the City of Cleveland, Ohio,

(b) exercising a certain option which Wheeling has to sell its Ontario Street Passenger Station Site to The Cleveland Terminals Building Company (hereinafter referred to as "Building Company"),

(c) performing certain contracts which it has with Erie Railroad Company (hereinafter referred to as "Erie"), and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter referred to as "Big Four"), for the temporary use of the tracks of Erie and Big Four and the temporary use of the passenger station facilities of Erie, all in the City of Cleveland, Ohio,

(d) performing a certain contract which Wheeling has to operate in passenger and allied service for a period of one hundred years, a proposed connecting track and passing siding of The Cleveland Terminals Company (hereinafter referred to as "Terminals"), and to acquire for a period of one hundred years passenger station facilities and service in the new union depot of Terminals, all in the City of Cleveland, Ohio.

And against the United States of America and the Interstate Commerce Commission to enjoin, set aside and annul the decisions, rulings and orders, of the Interstate Commerce Commission dated July 9, 1929, and issued July 23rd, 1929, in proceedings brought by Wheeling and designated as "Operation of Passenger Terminal Facilities at Cleve-[fol. 6] land, Ohio, by The Wheeling & Lake Erie Railway Company," Finance Docket 7298, and "Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by The Wheeling & Lake Erie Railway Company," Finance Docket 7299, authorizing Wheeling to

(a) abandon its Ontario Street Passenger Station Site,

(b) use temporarily the tracks of Erie and Big Four and the passenger station facilities of Erie, and

(c) upon completion of the new union depot of Terminals, to operate in passenger and allied service a proposed connecting track and passing siding of Terminals, and to acquire passenger station facilities and service in the union depot of Terminals.

Which said orders, decisions and rulings of the Interstate Commerce Commission were and are arbitrary and without warrant of law and therefore void. A copy of the rulings, decisions and orders of the Interstate Commerce

Commission so complained of is hereto attached, made a part hereof and marked Exhibit "A."

And in support hereof your complainant alleges and shows:

II

Your complainant, The Pittsburgh & West Virginia Railway Company, is a consolidated railroad corporation duly organized and existing under and by virtue of the laws of the States of Pennsylvania and West Virginia, having its principal place of business in the City of Pittsburgh, State of Pennsylvania, and is a resident and citizen of said States. It is and at all times hereinafter mentioned has been the owner and holder of 67,400 shares of the preferred and common capital stock of Wheeling, having a par value of $100 each, and is a carrier whose lines of railroad intersect and connect with those of Wheeling.

[fol. 7]

III

The defendant, Wheeling, is an Ohio railroad corporation having its principal place of business in the City of Cleveland, State of Ohio, and is a resident and citizen of said State, engaged as a common carrier in the transportation of passengers and property wholly by railroad between points in the States of Ohio and West Virginia in interstate commerce, and as such common carrier is subject to the provisions of the Act of Congress approved February 4th, 1887, known as the Interstate Commerce Act and of acts amendatory thereto and supplementary thereof, including the act known as the Transportation Act of 1920, approved February 28th, 1920, and of acts amendatory thereto and supplementary thereof. One of the termini of Wheeling, as specified in its Articles of Incorporation, is what is generally known as and is herein referred to as Wheeling's Ontario Street Passenger Station Site, which lies northeast of Eagle Avenue in the City of Cleveland, Ohio, and is bounded on the north by Huron Road, on the east by Ontario Street, on the south by Eagle Avenue and on the west by Canal Road, which property on the 3rd day of July, 1928, was and still is of a value of not less than $7,500,000.00.

The authorized capital stock of Wheeling is and when organized was $55,870,000 divided into 558,700 shares of the

par value of $100 each, which shares were and are divided into three classes as follows, to-wit: 118,826 shares were and are designated as a First Preferred or Prior Lien Stock; 103,450 shares were and are designated as Preferred Stock; 336,425 shares were and are designated as Common Stock.

The rights, preferences, voting powers, restrictions and qualifications of the several classes of stock aforesaid insofar as they are here material were and are that the holders [fol. 8] of the Prior Lien Stock of the corporation are to receive out of the net profits of the corporation cumulative dividends at the rate of not exceeding 7% per annum from November 1, 1916, payable quarterly on the first days of February, May, August and November in each year; that the holders of the Prior Lien Stock had the right for a period of five years following the incorporation of defendant to elect by vote of a majority in amount of the Prior Lien Stock present in person or by proxy at any meeting of the stockholders a majority of the directors of the corporation to be elected at such meeting and also the right thereafter to elect in like manner a majority of such directors whenever and as often as the corporation should have failed to pay dividends at the rate of 7% per annum on the Prior Lien Stock for five consecutive years ended on the quarterly dividend date next preceding such stockholders' meeting; that the holders of the Prior Lien Stock as well as the holders of the Preferred and Common Stock, all voting as a single class, are entitled to elect the remaining directors to be elected at such meeting, and that except as herein above set forth the Prior Lien Stock, the Preferred Stock and the Common Stock have proportionately equal voting rights for all other purposes.

IV

The Baltimore & Ohio Railroad Company (hereinafter referred to as "B. & O.") is a consolidated railroad corporation duly organized and existing under and by virute of the laws of the States of Maryland and Virginia, having its principal place of business in the City of Baltimore, Maryland, and duly authorized to do business in the State of Ohio, owning and operating a steam railroad in both interstate and intrastate commerce from the City of Pittsburgh,

[fol. 9] Pennsylvania, and numerous other points to the Cities of Cleveland, Lorain and Toledo, Ohio, and to other places both within and without the State of Ohio.

V

The New York Central Railroad Company (hereinafter referred to as "Central") is a consolidated railroad corporation organized and existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, having its principal place of business in the City of Albany, New York, owning and operating a steam railroad in both interstate and intrastate commerce from the City of Pittsburgh, Pennsylvania, and other points to the Cities of Cleveland, Huron and Toledo, Ohio, and to other places both within and without the State of Ohio.

VI

The Lake Erie Alliance and Wheeling Railroad Company (hereinafter referred to as "Alliance") is a railroad corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Cleveland, Ohio, whose line of railroad extending from Phalanx, Ohio, to Dillonvale, Ohio, is leased to and operated by Central in both interstate and intrastate commerce from Phalanx, Ohio, and other points to Dillonvale, Ohio, and to other places both with- and without the State of Ohio.

VII

The New York, Chicago & St. Louis Railroad Company (hereinafter referred to as "Nickel Plate") is a consolidated railroad corporation duly organized and existing [fol. 10] under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Indiana and Illinois, having its principal place of business in the City of Cleveland, Cuyahoga County, Ohio, owning and operating a steam railroad in both interstate and intrastate commerce from the City of Cleveland, Ohio, and other points to the Cities

of Lorain and Toledo, Ohio, and to other places both within and without the State of Ohio.

VIII

Erie owns and operates a steam railroad in both interstate and intrastate commerce from the City of Youngstown, Ohio, and other points to the Cities of Cleveland, Kent, and Creston, Ohio, and to other places both within and without the State of Ohio.

IX

The Chesapeake & Ohio Railway Company (hereinafter referred to as "Chesapeake") is a consolidated railroad corporation duly organized and existing under and by virtue of the laws of Virginia, West Virginia, Ohio, Indiana, Illinois, Kentucky and District of Columbia, having its principal place of business in the City of Richmond, Virginia, owning and operating a steam railroad in both interstate and intrastate commerce from Newport News, Virginia, and other points to the City of Cincinnati, Ohio, and to other places both within and without the State of Ohio.

X

The Hocking Valley Railway Company (hereinafter referred to as "Hocking") is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in [fol. 11] the City of Columbus, Ohio, owning and operating a steam railroad in both interstate and intrastate commerce from the City of Toledo, Ohio, and other points to the Cities of Columbus and Gallipolis, Ohio, and to other places within the State of Ohio, and together with the line of The Chesapeake & Hocking Railway Company, the lines of which run from Valley Crossing, Ohio, to Gregg, Ohio, connects with the lines of Chesapeake at Gregg, Ohio.

XI

Your complainant is advised, believes and so charges the fact to be that a majority of the capital stock of Nickel

Plate, Erie, Chesapeake and Hocking, or the controlling interests thereof, is owned and controlled by O. P. Van Sweringen and M. J. Van Sweringen (hereinafter referred to as "Van Sweringens") or their nominees or other persons and corporations, the control of which is vested in Van Sweringens.

XII

For more than ten years last past Wheeling has been engaged in active competition with B. & O., Central, Alliance, Nickel Plate, Erie, Hocking and Chesapeake and their affiliated lines for the handling of traffic originating in the Cities of Pittsburgh, Pennsylvania, Wheeling, West Virginia, and Canton, Cleveland, Lorain, Huron and Toledo, Ohio, and intermediate territory, as well as points north, east, west and south thereof, for the routing of traffic over the lines of Wheeling in preference to the lines of Erie, Alliance, Chesapeake, Hocking, B. & O., Central and Nickel Plate, the lines of the three latter companies being for considerable distances substantially parallel with those of [fol. 12] Wheeling. The lines of railroad operated by Wheeling from Toledo, Huron, Lorain and Cleveland, Ohio, connect with the lines of your complainant at Pittsburgh Junction, Ohio, and together from a direct and through route and channel of trade and commerce between Pittsburgh, Pennsylvania, and the lake ports hereinabove mentioned. By reason of long existing interchange agreements, between Wheeling and your complainant and as a result thereof there has been permanently established a through route and channel of trade and commerce over the lines of your complainant and those of Wheeling extending from Pittsburgh, Pennsylvania, to the lake ports above mentioned, the traffic over which route is highly competitive with the traffic handled by Alliance, Erie, Hocking, Chesapeake, B. & O., Central and Nickel Plate.

XIII

For many years last past Van Sweringens, both individually and through various corporations owned or controlled by them, have been engaged in extensive real estate developments in and around the City of Cleveland, Ohio, and for the purpose of developing large tracts of land owned

or controlled by them lying east of the City of Cleveland, Ohio, Van Sweringens constructed, or through a corporation controlled by them, caused to be constructed, a certain electric railroad commonly called the Rapid Transit, which railroad furnishes transportation to and from the lands aforesaid and the Public Square in the City of Cleveland, Ohio. Van Sweringens are now and for some time past have been proposing the construction of additional electrical railroads or rapid transits for the purpose of further developing the lands aforesaid and of furnishing additional transportation to and from the same and the Public Square in the City of Cleveland, Ohio.

[fol. 13] XIV

Subsequent to the acquisition of the control of Nickel Plate and the construction of the Rapid Transit aforesaid, Van Sweringens on or about the 26th day of August 1918, organized or caused Terminals to be organized under the laws of the State of Ohio, for the purpose among other things of acquiring, owning and possessing the necessary lands, leaseholds, easements, franchises, grants, licenses and rights to construct, operate and maintain a railroad and union depot for both passengers and freight for the use of steam and electric railroads, which depot was to be built, operated and maintained upon lands abutting the southwest corner of the Public Square in the City of Cleveland, Ohio, pursuant to certain plans which had theretofore been prepared by Van Sweringens. The authorized capital stock of Terminals is $10,000.00 divided into 100 shares of the par value of $100 each, all of which was and is, except as is hereinafter stated, owned or controlled by Van Sweringens or corporations controlled by them. Upon completion of its railroad and union depot now under construction, Terminals intends to and will engage in interstate commerce as a common carrier for hire, and is therefore subject to the provisions of the Act of Congress approved February 4th, 1887, known as the Interstate Commerce Act, and of acts amendatory thereto and supplementary thereof, including the act known as the Transportation Act of 1920 approved February 8th, 1920, and of acts amendatory thereto and supplementary therof.

XV

The plans developed by Van Sweringens and Terminals for the construction and erection of such railroad and union [fol. 14] depot necessitated the acquisition of lands and interests in lands abutting the southwest corner of the Public Square and extending westerly therefrom to West 25th Street, and easterly therefrom to East 37th Street, all in the City of Cleveland, Ohio. Prior to and since the organization of Terminals, Van Sweringens, both individually and through corporations owned and controlled by them, and primarily through The Van Sweringen Company, The Sedgwick Land Company, The Terminal Properties Company and Building have acquired such lands as were available and necessary for Terminals to have in order to erect and construct its terminal railroad and union depot.

XVI

Some time prior to October 23rd, 1918, Van Sweringens and Terminals initiated an ordinance to be submitted to the electors of the City of Cleveland, Ohio, and to be passed by the City Council of the City of Cleveland, Ohio, authorizing the Mayor of the City of Cleveland, Ohio, to enter into a contract with Terminals for the construction, erection, operation and maintenance of a railroad and union depot abutting the southwest corner of the Public Square according to the plans and specifications that had theretofore been prepared as aforesaid. Such ordinance was passed by the Council of the City of Cleveland, Ohio, as Ordinance No. 47,814 on the 23d of October 1918. The same was approved by the Mayor of the City of Cleveland, Ohio, on November 1st, 1918, and upon the 6th day of January 1919, was approved by the electors of the City and the same was subsequently accepted by Terminals. Thereupon Terminals became obligated to acquire the lands, leaseholds, easements, franchises, grants, licenses and rights necessary to construct, build, operate and main- [fol. 15] tain the railroad and union depot, all as required by Ordinance No. 47,814 and the plans and specifications aforesaid.

XVII

On or about the 19th day of January, 1921, Van Sweringens organized or caused Building to be organized under

the laws of the State of Ohio, all or a majority of the capital stock of which company was and is owned or controlled by Van Sweringens or other persons or corporations controlled by them. Thereupon Building acquired from The Terminal Properties Company, Van Sweringens and other persons and corporations controlled by them, all the lands and interests in lands which had theretofore been acquired by them and which were necessary for Terminals to have in order to erect and construct thereon its railroad and union depot and the approaches thereto.

XVIII

On or about the 1st day of February, 1921, it was proposed that Central and its subsidiary, Big Four, together with Nickel Plate and Terminals, should enter into an agreement whereby Central should agree to purchase 64%, Big Four 28% and Nickel Plate 8% of the capital stock of Terminals which then stood in the name of O. P. Van Sweringen. In this proposed agreement Central, Big Four and Nickel Plate were to agree that upon demand of Terminals they would guarantee the full performance and payment of all mortgage bonds which might thereafter be issued by Terminals for the purpose of securing funds with which to acquire lands, leaseholds and easements upon which to construct, erect, operate and maintain its railroad and union depot and the approaches thereto, and further [fol. 16] that they would from time to time, upon demand of Terminals, advance to it such sum or sums as might be necessary to enable Terminals promptly to meet its obligations. To this proposed agreement there was attached as exhibits and parts thereof a complete set of the plans and specifications for the erection of such railroad and union depot, which plans and specifications were identical with those described and referred to in Ordinance No. 47,814 aforesaid, save and except for such modifications as had been agreed to between the City of Cleveland and Terminals subsequent to October 23rd 1918, and evidenced by ordinances of the City of Cleveland amendatory of and supplemental to Ordinance No. 47,814, and it was further proposed that Central, Big Four and Nickel Plate should cooperate with Terminals to the end that the railroad and

union depot should be constructed as required by such ordinances. In this proposed agreement it was further provided that a committee of four be appointed by the railroads, two by Central, one by Big Four and one by Nickel Plate, and that no contract for the purchase of lands by Terminals and no change in the plans for the construction of the railroad or union depot were thereafter to be made by Terminals without the consent of at least a majority of such committee. Such plans and specifications designated parts of the union depot as a Traction Terminal, Concession Area and Joint Area, and Terminals was to agree not to grant the use of the Traction Terminal, Concession Area and Joint Area to any person, firm or corporation except such as might be approved by Central, Big Four and Nickel Plate. The proposed agreement further provided that in consideration of the execution thereof by the respective parties thereto Nickel Plate would assume all the obligations imposed upon Terminals by Ordinance No. 47,814 and other ordinances amendatory thereof and [fol. 17] supplemental thereto relative to the construction, operation and maintenance of a freight terminal and freight trackage facilities.

XIX

It was further proposed that Central, Big Four and Nickel Plate enter into an agreement with O. P. Van Sweringen whereby Central would buy sixty-four (64) shares, Big Four twenty-eight (28) shares and Nickel Plate eight (8) shares of the capital stock of Terminals, being all of its authorized and outstanding capital stock and which then stood in the name of O. P. Van Sweringen, who would sell the same in the proportions above set forth upon the condition and agreement that notwithstanding the transfer thereof Central, Big Four and Nickel Plate would permit O. P. Van Sweringen to choose and elect his own nominees as directors of Terminals until such time as Terminals had completed the erection and construction of so much of the union depot and its approaches as is known as the Passenger Terminal, and complainant alleges that by reason of the premises and the facts hereinafter set forth and since the 1st day of February, 1921, O. P. Van Sweringen

has controlled, and until such time as the Passenger Terminal is completed will domniate and control Terminals and its policies.

XX

On the same day, to-wit, on or about the 1st day of February, 1921, it was proposed that Terminals should, with the consent of Central, Big Four and Nickel Plate enter into an agreement with The Cleveland Traction Terminals Company, an Ohio corporation (hereinafter referred to as "Trac-
[fol. 18] tion"), organized, owned or controlled by Van Sweringens or persons or corporations controlled by them, whereby Terminals would grant to Traction for a period of 999 years all the rights of user in and to so much of the union depot to be constructed by Terminals as is known and designated upon the plans therefor as the Traction Terminal and Concession Area, together with the right to use in common with others so much of the union depot as is known and designated upon the plans therefor as the Joint Area, all subject, however, to the provisions of Ordinance No. 47,814 of the City of Cleveland, Ohio, and other ordinances amendatory thereof and supplemental thereto, and subject to other terms and conditions set forth at length in such grant.

XXI

Thereupon and on or about the 15th day of February, 1921, Central, Big Four and Nickel Plate filed an application in Finance Docket No. 1237 with the Interstate Commerce Comimssion (hereinafter referred to as the "Commission") for authority and for a Certificate of Public Convenience and Necessity evidencing the Commission's approval in respect to their purchase of the capital stock of Terminals and the erection, construction and maintenance of a railroad and union depot by them through their control of Terminals, all as set forth in the plans and specifications aforesaid and the proposed agreements hereinbefore set forth in paragraphs XVIII, XIX and XX hereof.

XXII

The plans for Terminals' railroad, union depot and approaches thereto as aforesaid made it necessary for Ter-

minals to acquire the right to use Wheeling's Ontario [fol. 19] Street Passenger Station Site, and by reason thereof and by leave of the Commission first had and obtained Wheeling in said cause No. 1237 filed an intervening petition protesting the granting of the application aforesaid of Central, Big Four and Nickel Plate. Thereupon and on April 21st, 1921, in consideration of Wheeling's withdrawal of its protest and intervening petition, it was stipulated and agreed by and between Terminals, Central, Big Four and Nickel Plate on the one hand and Wheeling on the other that any order made by the Commission granting the Certificate of Public Convenience and Necessity applied for as aforesaid should be without prejudice or bar to or influence upon any rights of Wheeling under the laws of the State of Ohio in relation to its then existing Ontario Street Passenger Station Site in the City of Cleveland, Ohio.

XXIII

Thereafter and on the 6th day of December, 1921, the Commission granted to Central, Big Four and Nickel Plate a Certificate of Public Convenience and Necessity authorizing Central to acquire 71%, Big Four 22% and Nickel Plate 7% of the capital stock of Terminals and except as so modified to execute the proposed agreements hereinabove in paragraphs XVIII, XIX and XX hereof set forth, and through their control of Terminals to erect and construct in the City of Cleveland, Ohio, at the southwest corner of the Public Square a union depot and railroad, all in accordance with the plans and specifications aforesaid. (The Cleveland Passenger Terminal case, 70 I. C. C. 659.) Thereupon and on the 8th day of December, 1921, Central, Nickel Plate, Big Four, Terminals, Traction and O. P. Van [fol. 20] Sweringen executed the agreements hereinabove in paragraphs XVIII, XIX and XX hereof referred to.

XXIV

The order of the Commission did not contain any finding that the same was without prejudice or bar to or influence upon any rights of Wheeling under the laws of the State of Ohio in relation to its Ontario Street Passenger Station Site in the City of Cleveland, Ohio, and Wheeling there-

upon purposed to file an application with the Commission requesting it to modify its Certificate of Public Convenience and Necessity in order that the same might conform to the stipulation aforesaid dated April 21st, 1921, and in consideration of Wheeling's forbearing to file such application a supplemental stipulation was entered into on the 26th day of January, 1922, between Terminals, Central, Big Four and Nickel Plate on the one hand and Wheeling on the other, whereby it was stipulated and agreed that notwithstanding the omission in the final order of the Commission and the failure of the final order to make any reference to the stipulation of the parties dated April 21st, 1921, the final report and order of the Commission dated December 6th, 1921, should be without prejudice to the rights of Wheeling as set forth in the stipulation of April 21st, 1921, which latter stipulation was by such supplemental stipulation ratified, confirmed and adopted by the parties as defining their respective rights and obligations in respect to the matters and things therein set forth, anything in the final report and order of the Commission to the contrary notwithstanding.

[fol. 21] XXV

On January 1, 1922, Building and Terminals with the consent of Central, Nickel Plate and Big Four entered into an agreement whereby Building, reserving to itself all air rights over certain portions thereof, agreed to convey to Terminals all the lands which Building had acquired or might thereafter acquire and which were necessary for Terminals to have to erect and construct therein or thereon the Union Depot and the westerly approach thereto, and whereby Terminals agreed to pay therefor the cost thereof to Building plus carrying charges without deduction for the air rights so reserved. Building further agreed to obtain the lands necessary for the construction of the easterly approach to the union depot of Terminals and to grant to Terminals a perpetual easement therein. The easterly approach to the union depot begins with the south line of Huron Road in the City of Cleveland, Ohio, and extends thence in a southerly and easterly direction through Wheeling's Ontario Street Passenger Station Site and thence to East 37th Street in the City of Cleveland, Ohio.

XXVI

Thereafter Terminals with the consent of Central, Nickel Plate and Big Four and the City of Cleveland, by ordinance amendatory of and supplementary to Ordinance No. 47,814, agreed upon the erection and construction of what is commonly called the Eagle Avenue ramp, the construction of which at the level and grade agreed upon makes it impossible for Terminals and Wheeling jointly to use Wheeling's Ontario Street Passenger Station Site.

[fol. 22] XXVII

At the hearing had before the Commission aforesaid in Finance Docket 1237, it was estimated by Central, Big Four and Nickel Plate that the cost of acquiring the necessary lands and interests therein for the construction and erection of the railroad and union depot of Terminals plus the cost of erecting and constructing the same would not be in excess of $61,000,000; that the amount of money already expended by Terminals as shown by its financial statements plus the amount of money which it will have to expend to complete the erection and construction thereof shows that the total cost thereof when completed will be in excess of $100,000,000, a cost which is greatly in excess of that required for the public convenience and necessity.

XXVIII

For many years past B. & O., Central and Nickel Plate have been attempting to effect a consolidation of the railroad properties in northeastern and central United States for the purpose of establishing therein a limited number of railroad systems under their domination and control.

XXIX

For several years past and subject to the approval of the Commission, now obtained, complainant has been proposing an extension of its lines from a point at or near Pittsburgh, Pennsylvania, to Connellsville, Pennsylvania, at which latter point its proposed extension now under construction will connect with the lines of the Western Maryland Railway Company (hereinafter referred to as "Maryland")

[fol. 23] which lead from Connellsville, Pennsylvania, to Baltimore, Maryland. This proposed extension, together with the existing interchange agreements between complainant and Wheeling and proposed interchange agreements between complainant and Maryland, would create the shortest and most direct route and channel of trade and commerce from Toledo, Huron, Lorain and Cleveland, Ohio, and points west and south thereof and from intermediate points, to the Atlantic seaboard at Baltimore, Maryland, the establishment and creation of which would be of great and material benefit to Wheeling and would increase the competition now existing as hereinabove set forth between Wheeling on the one hand and B. & O., Central and Nickel Plate on the other.

XXX

With full knowledge of all the facts hereinabove set forth and by reason thereof and for the purpose of restricting trade and commerce among the several states and of destroying the existing competition between Wheeling and them and other lines of railroad controlled by them, and for the purpose of preventing complainant from establishing a coast to lakes line of railroad, with Wheeling as an integral part thereof and in competition with the limited number of railroad systems proposed by them to be established, and for the further purpose of fulfilling their obligation to Terminals to acquire for it an easement across Wheeling's Ontario Street Passenger Station Site at a price satisfactory to themselves so that they, as well as Rapid Transit, Traction and such other railroads as may desire to use the union depot of Terminals, could enter and leave the same over the Easterly Approach, and for the still further purpose of forcing Wheeling to use the railroad and union depot facili- [fol. 24] ties of Terminals and thereby contribute to the excessive cost of the erection, construction, maintenance and operation thereof, B. & O., Central and Nickel Plate in the fall of 1926 and spring of 1927, entered into an agreement and thereby conspired to purchase and obtain from the holders thereof a majority of or controlling interest in the capital stock of Wheeling and Maryland, and through the purchase thereof to restrain trade and commerce, destroy competition, prevent complainant from establishing a coast

to lakes railroad with Wheeling as an integral part thereof, and fulfill their obligation to Terminals to acquire for it an easement across Wheeling's Ontario Street Passenger Station Site and force Wheeling to use the railroad and union depot facilities of Terminals, all as aforesaid.

XXXI

In furtherance of such agreement and conspiracy and between December 1926 and May 1st, 1927, B. & O., without the consent of the Commission, or that of its stockholders, procured and purchased a controlling interest in Maryland, a competing railroad corporation, and B. & O., Central and Nickel Plate, without the consent of their respective stockholders or that of the Commission, each procured the following number of shares of the capital stock of Wheeling:

	Prior Lien	Preferred	Common	Total
B. & O.	38,397	4,934	56,000	99,331
Central	38,398	4,933	56,000	99,331
Nickel Plate ...	38,398	4,933	56,000	99,331
Total	115,193	14,800	168,000	297,993

[fol. 25] believing that the control of Wheeling was vested in the holders of Prior Lien stock upon which no dividends had theretofore been declared, and upon which, though the earnings of Wheeling were ample therefor, the directors, elected as hereinafter set forth, failed to declare any dividends until November 1, 1928, so as to permit B. & O., Central and Nickel Plate in the meantime to accomplish in part their agreement and conspiracy aforesaid.

XXXII

Thereupon and in furtherance of the agreement and conspiracy aforesaid and at the annual stockholders' meeting of Wheeling held on May 25, 1927, B. & O., Central and Nickel Plate as the holders of Prior Lien stock upon which no dividends had been paid for five consecutive years ended on May 1, 1927, and over the objection of this complainant and other holders of preferred and common stock, insisted upon and were granted the right to elect, and they thereupon

as a Class did elect, eight directors out of a total of fifteen that were to be elected at such meeting, although the right of prior lien stockholders to elect as a class a majority of the Board of Directors when default had occurred in the payment of dividends had never theretofore been exercised by the holders of such stock and had been lost to them by reason of their failure so to do, no dividends ever having been paid thereon prior to November 1, 1928. Further, voting together with the other stockholders for the election of the remaining seven directors, B. & O., Central and Nickel Plate, over the objection of complainant and other common and preferred stockholders, elected four more directors, making a total of twlve directors out of a total Board of fif- [fol. 26] teen that were elected by B. & O., Central and Nickel Plate. In the same manner and over the objection of complainant and other preferred and common stockholders of Wheeling, B. & O., Central and Nickel Plate at the annual meeting of stockholders held on May 23rd, 1928, maintained their representation of twelve members on the Board of Directors, and this notwithstanding the fact that on May 17th, 1928, the Commission issued and served complaints upon B. & O., Central and Nickel Plate requiring them to show cause why they should not dispossess themselves of Wheeling stock acquired as aforesaid.

XXXIII

In furtherance of the agreement and conspiracy aforesaid the Executive Committee of Wheeling composed entirely of directors elected by B. & O., Central and Nickel Plate, at a meeting thereof held on July 3rd, 1928, resolved to recommend to the directors of Wheeling that they accept an offer of Terminals to furnish Wheeling with passenger station facilities in Terminals' new union depot when, if and as the same shall have been completed, and in the meantime to provide Wheeling with temporary passenger station facilities free of cost to Wheeling, all provided and subject, however, to an agreement to be made between Terminals and Wheeling as to the value of Wheeling's Ontario Street Passenger Station Site, which the executive Committee resolved to recommend to the directors be sold to Terminals for $1,600,000.

XXXIV

At a meeting of the directors of Wheeling held on the 11th [fol. 27] day of July, 1928, the Executive Committee recommended that Wheeling sell to Terminals Wheeling's Ontario Street Passenger Station Site for a consideration of $1,600,000, provided that between the time when Wheeling should vacate the same and the time when Terminals' railroad and new union depot should be completed, Terminals should furnish Wheeling, free of cost, temporary passenger station facilities at the depot of Erie, and that, upon the completion of the railroad and union depot by Terminals, Wheeling should have the use thereof for a period of twenty-five years at a rental of $20,000 per annum for 3,000 trains of not more than 14,000 cars; and it was thereupon moved and seconded by directors elected by B. & O., Central and Nickel Plate that the recommendations of the Executive Committee aforesaid be approved and adopted and taken as the action of the Board, and that the officers of Wheeling be authorized to do all such things as were necessary to carry out such recommendations.

XXXV

Thereupon complainant and other holders of the common and preferred stock of Wheeling protested the action proposed by the resolution aforesaid, for the reason that the Ontario Street Passenger Station Site of Wheeling is one of its termini which could not be altered or changed without the consent of its stockholders; and for the further reason that the resolution provided for the sale to another railroad of a part of Wheeling's property then being used, and to be used, by Wheeling and such other railroad, for railroad purposes and for the purpose of connecting the two railroads, which sale could be effected only after proper action of Wheeling's stockholders, and as the resolution of-[fol. 28] fered did not contemplate any stockholders' action complainant protested against any action upon the same by the directors. Complainant, together with other holders of the common and preferred stock, further protested for the reason that a majority of the members of the Board of Directors owned only qualifying shares of stock of Wheeling and had been elected as directors by the votes of the stock

of B. & O., Central and Nickel Plate, acquired as hereinabove set forth, which railroads also owned and controlled Terminals and were under obligations to secure an easement across Wheeling's property for Terminals, and by reason thereof the directors were disqualified to act; and the complainant and other stockholders further protested any action upon the resolution, for the reason that the price proposed was neither the fair and reasonable value of the property so about to be sold, nor the best price obtainable therefor. Thereupon and over the protest of this complainant and other holders of the preferred and common stock of Wheeling, and without taking any action upon the resolution aforesaid, it was moved and seconded that the meeting be adjourned to meet July 20th, 1928.

XXXVI

At the adjourned meeting of directors of Wheeling held July 20, 1928, it was resolved by the directors of Wheeling who had been elected by the votes of B. & O., Central and Nickel Plate, that the officers of Wheeling be, and they thereby were, authorized and directed to enter into a contract with Terminals for the use by Wheeling of Terminals' railroad and union depot when, if and as the same should be completed, and pending the completion thereof to contract [fol. 29] with Terminals for the use of temporary passenger station facilities at the Station of Erie, and when such temporary arrangements had been made to vacate Wheeling's Ontario Street Passenger Station Site. It was further resolved by the same directors that the officers of Wheeling be, and they thereby were, authorized to enter into an agreement with Building whereby Wheeling was to be given the option for a period of five years upon ten days' written notice to sell and convey to Building Wheeling's Ontario Street Passenger Station Site, for the sum of $1,600,000 to be paid in cash by Building upon delivery of a deed by Wheeling, the obligation of Building to pay said sum of $1,600,000, upon the exercise by Wheeling of its option to be guaranteed by The Vaness Company or other person satisfactory to the directors or Executive Committee of Wheeling, The Vaness Company being a corporation, the control of which through stock ownership is vested in Van Sweringens or other persons and corporations controlled by them.

XXXVII

Action upon the resolutions aforesaid by the directors of Wheeling who held their office by virtue of the votes of stock acquired in the manner hereinabove set forth and owned by B. & O., Central and Nickel Plate was protested by this complainant and other holders of common and preferred stock, by reason of the fact

(a) that the same did not contemplate the submission thereof to the stockholders of Wheeling as required by law,

(b) that the directors who had been elected as such by the votes of stock held by B. & O., Central and Nickel Plate [fol. 30] and acquired by them, as hereinabove set forth, were unlawfully holding office,

(c) that the directors who had been elected as such by the votes of stock held by B. & O., Central and Nickel Plate, were disqualified to act by reason of the interest of B. & O., Central and Nickel Plate in the subject matter of such resolution, all as is hereinabove alleged,

(d) that the consideration of $1,600,000 was neither the fair and reasonable value of Wheeling's property so about to be sold, nor the best price obtainable therefor,

(e) that the two resolutions so offered were subterfuges and an attempt to do indirectly what could not otherwise be done directly in that the directors knew that Terminals had to cross Wheeling's Ontario Street Passenger Station Site, and knew that they could not grant Terminals any interest therein without the consent of two-thirds of the stockholders of Wheeling and Terminals, and, in an effort to enable Terminals to acquire an easement in Wheeling's property without the consent of the stockholders of Wheeling and Terminals, the directors, controlled as aforesaid by B. & O., Central and Nickel Plate, offered the two resolutions hereinabove in this paragraph set forth, knowing of the agreement aforesaid between Terminals and Building and further knowing that, as soon as Wheeling vacated its property and accepted temporary passenger station facilities at the Station of Erie they would exercise Wheeling's so-called option to sell to Building, and thereupon Terminals, pursuant to its contract aforesaid with Building, would

immediately take possession of Wheeling's property and construct and erect thereon the Easterly Approach to its union depot so that B. & O., Central, Nickel Plate, Traction and Rapid Transit could enter and leave the union depot [fol. 31] from the east, and so that Nickel Plate could perform its agreement aforesaid and construct, operate and maintain a freight terminal and freight trackage facilities.

XXXVIII

Notwithstanding complainant's protest aforesaid, said resolutions were adopted by the votes of those directors who were elected as such by the votes of the stock of B. & O., Central and Nickel Plate.

XXXIX

At a meeting of the directors of Wheeling held on November 23, 1928, pursuant to an adjournment taken on November 14th, 1928, the Executive Committee of Wheeling reported that the proposed contracts and agreements between Wheeling, Terminals and Building, the execution of which had been authorized by the resolutions of the directors adopted at their meeting on July 20, 1928, had not been executed by reason of the fact that certain changes were desired to be made in the agreement with Terminals, which changes the Executive Committee recommended that the directors authorize. Thereupon the directors elected, as aforesaid, by the votes of stock owned by B. & O., Central and Nickel Plate and over the protest of other directors, which protest was made for the reasons hereinabove set forth, by resolution authorized the officers of Wheeling,

(a) to enter into an agreement with Terminals whereby Terminals would agree to furnish Wheeling with passenger station facilities at the union depot of Terminals when, if and as the same is completed, and whereby Wheeling would agree to use such passenger station facilities when, if, and [fol. 32] as the same are completed, for a period of twenty-five years at a rental of $20,000 per annum for 3,000 trains of not more than 14,000 cars;

(b) to enter into an agreement with Erie whereby Erie, in consideration of certain payments to be made by Wheel-

ing, would agree to permit Wheeling to use its passenger station facilities and certain of its tracks until such time as Terminals' union depot is completed;

(c) to enter into an agreement with Big Four whereby Big Four, in consideration of certain payments to be made by Wheeling, would agree to permit Wheeling to use certain of its tracks in order that Wheeling might temporarily use Erie's passenger station;

(d) to enter into an agreement with Terminals whereby Terminals agrees to reimburse Wheeling for the amounts which Wheeling is compelled to pay Erie and Big Four under the agreements between them and Wheeling hereinabove referred to.

XL

Thereupon Big Four, Erie and Terminals executed the agreements referred to in the preceding paragraph and Building executed the agreement referred to in paragraph XXXVI hereof and all the agreements so executed were presented to the officers of Wheeling who on December 7, 1928, executed the same.

XLI

Wheeling does not desire to abandon and sell its Ontario Street Passenger Station Site unless it can use the terminal facilities of Terminals upon terms requiring it to pay therefor not to exceed $20,000.00 per annum for 3,000 trains of [fol. 33] not more than 14,000 cars, which is all that Wheeling can afford to pay. The contract under which it proposes to use the terminal facilities of Terminals is in substance a lease by Terminals of a part of its railroad to Wheeling, (to which Wheeling does not have the consent of its stockholders) upon terms admittedly as much as Wheeling can afford to pay but which purport to exact from Wheeling far less than the amount which other carriers which have agreed to use the depot will have to pay for similar service, and less than the actual cost to Terminals of rendering to Wheeling the service required thereby. The contract further purports to provide that Wheeling may at any time that it is dissatisfied with the facilities and/or

service furnished by Terminals, and upon sixty days' written notice thereof, require Terminals to pay it as liquidated damages the cost, not exceeding $200,000.00, of constructing a passenger station upon property of Wheeling and upon the completion of such passenger station Wheeling is to be relieved from any further obligation under such contract. The contract further provides:

"This agreement is made subject to all existing and future federal or state laws, and to all rules or orders made by any board, commission or body having competent authority to regulate any of the parties hereto, and to the approval and authorization of the Interstate Commerce Commission (if required by law). In case it should be found to conflict with any such law, rule or order it shall be modified to conform thereto."

XLII

On December 8th, 1928, Wheeling filed an application with the Commission in Finance Docket No. 7298 for a certificate of public convenience and necessity authorizing it under [fol. 34] Paragraphs 18 to 20 inclusive of section 1 of the Interstate Commerce Act:

(a) To operate in passenger and allied services, for a period of 100 years, a proposed connecting track and passing siding of The Cleveland Union Terminals Company;

(b) To acquire, for a period of 100 years, passenger station facilities and service in the new union depot of The Cleveland Union Terminals Company; and

(c) To operate, temporarily, a portion of an industrial, siding track of the applicant, tracks and station facilities of the Erie Railroad Company and tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company.

Upon the same day Wheeling filed an application with the Commission in Finance Docket No. 7299 for a certificate of public convenience and necessity under Paragraphs 18 to 20 inclusive of Section 1 of the Interstate Commerce Act, authorizing Wheeling to abandon a portion of its line of railroad including its Ontario Street Passenger Station in the City of Cleveland, Ohio.

On January 17th, 1929, your complainant, by leave of the Commission first had and obtained to intervene in Finance Dockets Nos. 7298 and 7299, filed its petitions of intervention and therein protested the granting of the certificates prayed for by Wheeling. Subsequent thereto and on the 21st day of January, 1929, and by leave of the Commission first had and obtained, supplementary intervening petitions were filed by your complainant.

Beginning on January 21st, 1929, a consolidated hearing was had upon the applications and intervening petitions [fol. 35] aforesaid before an examiner appointed by the Commission, who excluded certain testimony offered by your complainant, and on January 24th, 1929, continued said hearing until such time as the Commission could pass upon his rulings with respect to the testimony of this complainant so excluded.

XLIII

Pending a review by the Commission of the rulings of its examiner aforesaid and on the 11th day of March, 1929, the Commission found and determined that the acquisition of Wheeling's stock by B. & O., Central and Nickel Plate was in violation of Section 7 of the Clayton Act, and ordered B. & O., Central and Nickel Plate to divest themselves thereof within ninety days from March 11th, 1929, in a manner satisfactory to the Commission. (Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 152 I. C. C. 721.)

XLIV

On the 22nd day of April, 1929, the Commission ordered its examiner to receive in Finance Dockets 7298 and 7299 the evidence excluded by him as aforesaid, and ordered that the same be heard May 13th, 1929.

At such further hearing and by leave of the Commission first had and obtained Terminals intervened and filed intervening petitions praying that the certificates of public convenience and necessity sought by Wheeling be granted. Such hearing was concluded on May 18th, 1929, briefs were filed with the Commission on June 15th, 1929, and the applications were argued to the full Commission on June 17th, 1929.

[fol. 36] On July 23rd, 1929, the Commission made its report, ruling and order granting the certificates of public convenience and necessity prayed for, all as more fully appears from Exhibit "A" hereto attached page 49. The certificates so granted while not made known until July 23rd, 1929, are dated July 9th, 1929 and by their terms become effective from and after thirty days from the date thereof, which is less than thirty days from the date upon which the same were made known. On August 1st, 1929, your complainant filed with the Commission a petition to modify its orders by changing the effective dates thereof to a date not less than thirty days from July 23rd, 1929, all as is required by paragraph 2 of Section 15 of the Interstate Commerce Act. On August 8th, 1929 the Commission amended its certificates so as to become effective August 20th, 1929. On August 3rd, 1929 your complainant filed with the Commission a petition for rehearing or reargument, which petition the Commission denied on August 8th, 1929.

XLV

On the 10th day of June 1929 the Commission extended for a period of thirty days the time within which B. & O., Central and Nickel Plate were required under the Commission's order of March 11th, 1929 to divest themselves of Wheeling's stock, and on the 10th day of July, 1929 again extended such time for a further period of thirty days. On July 30th, 1929 such order of divestiture was fully complied with by depositing the stock of Wheeling acquired as hereinabove set forth with a trustee appointed by the Commission to hold the same pursuant to the terms of a certain trust agreement executed July 30th, 1929, the terms and conditions of which are not here material.

[fol. 37] XLVI

It is now proposed by the officers of Wheeling acting under the instructions and control of those directors of Wheeling who were elected as such by the votes of the stock held and owned by B. & O., Central and Nickel Plate, and who are acting under the influence. instruction and control of B. & O., Central and Nickel Plate, that Wheeling should, and unless enjoined by this Court, Wheeling will on the

effective dates of the orders of the Commission aforesaid in Finance Dockets 7298 and 7299, without the consent of its stockholders, immediately abandon its Ontario Street Passenger Station Site and take up temporary passenger station facilities at the station of Erie and temporarily use the tracks of Erie and Big Four, all under the contracts aforesaid, and will immediately exercise its option to sell its Ontario Street Passenger Station Site to Building for the inadequate consideration of $1,600,000, so as to permit Terminals to immediately take possession thereof and construct therein, thereon and thereover its railroad and the easterly approach to its union depot, so as to enable Central, Nickel Plate, Traction, Rapid Transit and such other railroads as may desire so to do to enter and leave the union depot from and to the east, and upon completion of the union depot of Terminals, will use the passenger station facilities of Terminals under the contract aforesaid, all to the great and irreparable loss and damage of the complainant and other stockholders, for which they will have no adequate remedy at law.

XLVII

The action so proposed to be taken by Wheeling is unlawful and illegal for the following reasons, to-wit:

[fol. 38] (a) It is authorized by directors who are unlawfully and illegally holding office as such by reason of the fact that they were elected by the votes of stock owned by B. & O., Central and Nickel Plate, competitors of Wheeling, which stock was acquired by B. & O., Central and Nickel Plate contrary to Sections 6391 et seq. of the General Code of Ohio and pursuant to a preconceived plan, agreement and conspiracy to suppress competition, restrain trade and commerce among the several states and create a monopoly contrary to Sections 1 and 2 of the Sherman Anti-Trust Act, Section 7 of the Clayton Anti-Trust Act, Section 37 of the United States Criminal Code, otherwise known as Section 10201 of the U. S. Compiled Statutes of 1916, and contrary to Sections 6391 et seq. of the General Code of Ohio and which stock was likewise acquired without the consent of the Commission as required by paragraph 2 of

Section 5 of the Interstate Commerce Act as amended by the Transportation Act of 1920.

(b) The agreement between Wheeling and Big Four, the agreement between Wheeling and Erie, the agreement between Wheeling and Building, and the agreement between Wheeling and Terminals, all as aforesaid, are agreements upon the part of Wheeling, Big Four and Erie to aid Terminals in the construction of its railroad and union depot for the purpose of connecting the two railroads of Wheeling and Terminals and of permitting Terminals to connect its railroad with the railroads of Central, Big Four, Nickel Plate, Traction, Rapid Transit and other railroads, without first securing the consent thereto of two-thirds of the stockholders of Wheeling, as required by Sections 8806 and 8809 of the General Code of Ohio.

[fol. 39] (c) The agreement between Wheeling and Building is a proposed sale to and purchase by Terminals of a part of Wheeling's railroad so that the lines of Wheeling and Terminals will be connected and continuous, without first securing the consent thereto of two-thirds of the stockholders of Wheeling as required by Sections 8807 and 8809 of the General Code of Ohio.

(d) The agreement between Wheeling and Terminals to use Terminals' railroad and union depot for a period of twenty-five years at a rental of $20,000 per annum is a lease by Terminals to Wheeling of a part of Terminals' railroad and union depot when, if, and as the same shall be completed, without first securing the consent thereto of two-thirds of the stockholders of Wheeling as required by Sections 8807 and 8809 of the General Code of Ohio.

(e) The agreement between Wheeling and Big Four is a lease to Wheeling of a part of the railroad of Big Four, and the agreement between Wheeling and Erie is a lease to Wheeling of a part of the railroad of Erie, both leases being proposed for the purpose of connecting the railroad of Wheeling with the railroads of Erie and Big Four, without having first secured the consent thereto of two-thirds of the stockholders of Wheeling, as required by Sections 8807 and 8809 of the General Code of Ohio.

(f) The agreements between Wheeling and Big Four, Wheeling and Erie, Wheeling and Building, and Wheeling and Terminals are agreements for the alleged common benefit of Wheeling, Big Four and Terminals after the railroads of Wheeling and Big Four are connected with the railroad of Terminals, which agreements are proposed without first obtaining the consent of two-thirds of the [fol. 40] stockholders of Wheeling, as required by Sections 8808 and 8809 of the General Code of Ohio.

(g) It is an attempt by those directors of Wheeling, who were elected as such by the votes of stock owned by B. & O., Central and Nickel Plate, to change one of the termini of its road, without first obtaining the consent thereto of three-fourths of its stockholders as required by Section 8747 of the General Code of Ohio.

(h) It is an attempt by those directors of Wheeling, who were elected as such by the votes of stock owned by B. & O., Central and Nickel Plate, to extend Wheeling's line of railroad beyond its previously designated termini, without first obtaining the consent thereto of a majority of Wheeling's stockholders, as required by Section 8772 of the General Code of Ohio.

(i) It is an attempt upon the part of B. & O., Central and Nickel Plate, through their control of Wheeling and twelve of Wheeling's directors, to acquire for Terminals, which is controlled by Central, Nickel Plate and Van Sweringens, Wheeling's Ontario Street Passenger Station Site, at a price satisfactory to themselves but for far less than the fair and reasonable value thereof or the best price obtainable therefor.

(j) Those directors of Wheeling who voted in favor of the resolutions aforesaid and thereby authorized the officers of Wheeling to do those things which it is now proposed to do as aforesaid were not and are not competent or qualified so to vote by reason of their interest therein, due to the fact that they held and hold their offices by virtue of the votes of stock owned by Central and Nickel Plate, who were and are under obligation to Terminals to obtain for Terminals Wheeling's Ontario Street Passenger Station Site.

[fol. 41] (k) The consideration of $20,000 per annum specified in the contract under which Wheeling proposes to use the union depot of Terminals, is less than the cost to Terminals of rendering the service required by the contract.

(l) The contract under which Wheeling proposes to use the union depot of Terminals purports to charge Wheeling a rate which is far less per train or per car than that which will be paid by any other carrier using the depot.

(m) The contract under which Wheeling proposes to use the union depot of Terminals provides for a rebate in that Wheeling may withdraw from the union depot of Terminals at any time that it is dissatisfied with the services rendered by Terminals at which time Terminals agrees to pay Wheeling for the construction of a new station the sum of $200,000.00.

(n) Wheeling, whose gross passenger revenue is but $318,000 per annum and whose passenger revenue from its Ontario Street Passenger Station is but $82,000 per annum, cannot afford to pay a non-discriminatory rate of between $200,000 and $300,000 per annum for the use of the terminal facilities of Terminals, but under the contract in question can be compelled so to do with the result that if Wheeling is permitted to do what it proposes to do, and if the orders of the Commission in Finance Dockets 7298 and 7299 are not enjoined, set aside and annulled, Wheeling will be deprived of the best located passenger station site in the City of Cleveland and for at least the next five years to come will be burdened with an obligation to pay for passenger station facilities in Cleveland alone, an amount greatly in excess of its revenues from its Cleveland passenger business and an amount equal to, if not in excess of, its gross passenger revenues from all sources.

[fol. 42] XLVIII

The report, findings and orders of the Commission herein complained of and set forth on pages 49 et seq. hereof, are null and void because based upon erroneous constructions of the statutes and erroneous conclusions of law made by the Commission in the following respects, to-wit:

(a) The Commission erroneously found that it was without jurisdiction to inquire into and adjudicate the illegality, as alleged in sub-paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) of paragraph XLVII hereof, of those things for which Wheeling sought certificates of public convenience and necessity.

(b) The Commission erred in concluding that its finding under date of March 11th, 1929, to the effect that the acquisition of Wheeling's stock by the B. & O., Central and Nickel Plate was unlawful and in violation of Section 7 of the Clayton Act, was a finding as of March 11th 1929 and not as of the fall of 1926 and spring of 1927, the time when such stock was acquired.

(c) The Commission erred in finding that it was without jurisdiction to prescribe the terms which Terminals must exact for the use of its railroad and union depot facilities, and in concluding that Terminals could agree with Wheeling upon terms which provide for a rebate and which are not only less than the amounts which other carriers now proposing to use the depot will have to pay, but which are less than the cost to Terminals of rendering the service called for in the agreement.

(d) The Commission erred in finding that it was without jurisdiction to prescribe the price at which Wheeling should dispose of its Ontario Street Passenger Station Site after abandonment.

[fol. 43] XLIX

The Commission erred in finding that the terms upon which Wheeling and Terminals have agreed for the use by Wheeling of Terminals' facilities approximate the out-of-pocket cost to Terminals of furnishing the same.

The uncontradicted testimony was to the effect that the out-of-pocket cost of furnishing facilities and service for 2,503 trains of an average of 3.3 cars per train was $19,110.00 per annum. While Wheeling operates 2,503 trains per annum, of an average of 3.3 cars per train, the figure of $19,110.00 does not take into consideration Wheeling's excursion trains or the fact that under the contract Wheeling can operate 3,000 trains per annum of an average of 4.6 cars per

train with no increase in the rental of $20,000.00. Moreover the figure of $19,110 does not include taxes or a return upon the purchase price of lands which Terminals must acquire to make a connection with Wheeling, the cost of receiving and dispatching 1,212 tons of mail per year handled by Wheeling, 271 pieces of express shipments per day of an average aggregate weight of 13,191 pounds, the handling of railway mail, newspapers, company material and supplies, milk, the furnishing of information by clerks, bulletin boards, notices and otherwise as to the arrival and departure of Wheeling's trains, a dispatcher, or any part of the maintenance and operating costs of signal towers and interlocking devices, wear and tear upon the tracks of Terminals due to the operation of Wheeling's trains thereover, or wear and tear upon Terminals' station facilities due to the use thereof by Wheeling's passengers aggregating approximately 100,000 per annum. It thus is apparent that the contract rental of $20,000.00 per annum, which is [fol. 44] all Wheeling admits it can afford to pay, does not cover the out-of-pocket cost to Terminals of furnishing its facilities for 2,503 trains, to say nothing of the 3,000 trains specified in the contract.

L

The Commission erred in finding that the contract under which Wheeling proposes to use the terminal facilities of Terminals was one favorable to Wheeling and not subject to attack.

Such finding is due to erroneous conclusions of law, is arbitrary and without any evidence to support it, in that:

(a) The Commission should have found that Terminals cannot legally place a burden upon other railroads by furnishing terminal facilities to Wheeling at less than cost simply because Wheeling cannot afford to pay more than $20,000.00 per annum for the service agreed to be furnished, or because Terminals desires a right of way across Wheeling's property, and inasmuch as the contract purports to charge Wheeling a rental of but $20,000.00 per annum for 3,000 trains, which is all that Wheeling can afford to pay and which is less than the cost of furnishing the services and facilities to be furnished, the contract is unlawful and illegal and not in the public interest.

(b) The Commission should have found that Terminals, as a common carrier for hire which intends to and will upon the completion of its union depot engage in interstate commerce, is subject to the provisions of the Interstate Commerce Act and Transportation Act of 1920, pursuant to the provisions of which it is its legal duty to furnish facilities and service to all carriers without preference or discrimination, and inasmuch as the contract under which [fol. 45] Wheeling proposes to use the facilities of Terminals is a preferential, discriminatory and rebating contract the same is unlawful and illegal, and inasmuch as Wheeling cannot afford to pay a non-preferential and non-discriminatory rate it is not in the public interest that Wheeling be permitted to make use of the terminal facilities of Terminals or abandon its Ontario Street Passenger Station Site.

(c) The Commission should have found that Wheeling, by and through its twelve directors who were elected as such by the votes of stock held by Nickel Plate, Central and B. & O., and acquired contrary to Section 7 of the Clayton Act, is under the control of the same interests which control Terminals and Building; that the obligation to furnish Terminals with an easement across Wheeling's property is upon Building, a non-carrier corporation; that it is unreasonable, illegal and unjust for Terminals to burden other carriers by giving Wheeling a preferential contract for the use of its facilities in order to enable a non-carrier corporation to fulfill its obligations.

(d) The Commission should have found that Wheeling, by and through its twelve directors who were elected as such by the votes of stock held by Nickel Plate, Central and B. & O., and acquired contrary to Section 7 of the Clayton Act, is under the control of the same interests which control Terminals, Central and Nickel Plate; that the action of the twelve directors of Wheeling in authorizing the abandonment of Wheeling's Ontario Street Passenger Station Site upon the execution of the contract for the use of Terminals' facilities was in furtherance of the unlawful and illegal purpose for which Nickel Plate, Central and B. & O. acquired stock control of Wheeling, in that by such action

and under the guise of granting Wheeling a preferential [fol. 46] contract for the use of Terminals' facilities, Wheeling's competitors are enabled to deprive Wheeling of what is and for years past has been the best located passenger station site in the City of Cleveland, and having deprived Wheeling of such property can then modify the preferential contract to require Wheeling to pay a legal non-preferential rate for the use of Terminal's facilities and thus burden Wheeling for their own benefit with an obligation which Wheeling admittedly cannot afford.

(e) The Commission should have found that Wheeling, by and through its twelve directors who were elected as such by the votes of stock held by Nickel Plate, Central and B. & O. and acquired contrary to Section 7 of the Clayton Act and Sections 8683 and 8807 of the General Code of Ohio, is under the control of the same interests which control Terminals and Building and which were under obligation to Terminals and Building to acquire for Building Wheeling's Ontario Street Passenger Station Site so that Building could perform its obligation to give Terminals an easement over the same; that such control of Wheeling was and is unlawful and illegal and was used for the purpose of authorizing that which Wheeling now seeks to do, all over the protest and objection of those directors of Wheeling who were elected by the minority stockholders thereof; that by reason of the premises Wheeling's stockholders have been deprived of the judgment of disinterested directors in a matter so important as the abandonment and sale of Wheeling's main passenger station property and the use by Wheeling of the terminal facilities of Terminals; that inasmuch as Wheeling's stockholders have not had the judgment of directors who have no interest, direct or indirect, in Terminals, Nickel Plate, Central or Building the application of Wheeling for a certificate of public convenience and necessity to use the terminal station of Termi- [fol. 47] nals and its application to abandon its Ontario Street Passenger Station Site have not been legally or lawfully authorized but are lacking in lawful corporate authority and should be denied.

LI

The Commission's orders are null and void, illegal and contrary to the evidence by reason of the fact that it found that it had no jurisdiction to fix the price at which Wheeling could dispose of its Ontario Street Passenger Station Site.

The Commission should have found that, inasmuch as Wheeling did not desire to abandon and sell its Ontario Street Passenger Station Site unless it was authorized to use the facilities of Terminals, it did have jurisdiction to determine whether or not the price at which Wheeling proposed to sell its Ontario Street Passenger Station Site, to-wit, $1,600,000, was the fair and reasonable value thereof and the best price obtainable therefor, and should have found that $1,600,000 was not the fair and reasonable value thereof nor the best price obtainable therefor and that it was not therefore in the public interest for Wheeling to abandon the same.

LII

The Commission erred in finding that if Wheeling retains its present Ontario Street Passenger Station, Terminals will be obliged to construct its tracks below those of Wheeling and lower its station area, placing the same on a grade of .56%, necessitating an additional expenditure by Terminals of approximately $10,000,000 and resulting in a delay of approximately two years in the completion of its depot, and that while these facts are not set out in the contract under which Wheeling proposes to use the depot of Termi-[fol. 48] nals, they nevertheless were in the mind of Terminals at the time the contract was made.

The Commission should have found that by reason of the contract between Terminals and Building referred to herein in paragraph XXV hereof, the duty of furnishing Terminals with a right to cross Wheeling's property at the level originally contemplated is upon Building, a non-carrier corporation, and that any damages which might be suffered by Terminals by reason of its inability to cross Wheeling's property at the level originally planned are damages which must be borne by Building and which cannot be made a burden upon transportation.

It is apparent from reading the report and findings of the Commission that the Commission was greatly influenced in its findings by the fact that Terminals had spent some $60,000,000 in building its station area and union depot, relying upon its contract with Building wherein Building agreed to deliver to Terminals an easement for the easterly approach to its station, and that if Wheeling were not permitted to do that for which it sought the certificates of public convenience and necessity prayed for, Building would not be able to deliver to Terminals an easement at the level originally planned across Wheeling's property, and that as a result thereof the completion of the union depot would be delayed some two years, its station area and tracks would have to be lowered below the grade originally planned and the tracks through Wheeling's property would have to be lowered so as to pass underneath Wheeling's tracks, all at an expense estimated to be $10,000,000. It is submitted, however, that the fact that Terminals and Building created the situation in which they now find themselves to be, with full knowledge of the fact that a right to cross Wheeling's property was necessary and that it had not been obtained, cannot justify or make legal, contracts which are otherwise illegal.

[fol. 49] LIII

The orders of the Commission are null and void, unlawful and illegal, in that they purport to become effective August 20th, 1929, which is less than thirty days from and after the date, to-wit, July 23rd 1929, upon which they were made known or served upon the parties in interest.

Wherefore and by reason of the premises complainant prays this Honorable Court:

1. That a preliminary and temporary injunction issue during the pendency of this cause against the defendant, The Wheeling & Lake Erie Railway Company, its officers, directors, agents, attorneys and employes restraining them and each of them until further order of the court:

(a) From abandoning that property of Wheeling known as its Ontario Street Passenger Station Site which lies northwest of Eagle Avenue in the City of Cleveland, Ohio,

and which is bounded on the north by Huron Road; on the east by Ontario Street; on the south by Eagle Avenue; and on the west by Canal Road.

(b) From exercising the option given by Wheeling to The Cleveland Terminals Building Company to sell its Ontario Street Passenger Station Site to The Cleveland Terminals Building Company for $1,600,000.

(c) From performing or in any wise carrying out the contract executed by it on December 7th, 1928, with Erie for the temporary use of Erie's tracks and passenger station facilities in the City of Cleveland, Ohio; and from performing or in any wise carrying out the contract executed by it on December 7th, 1928, with Big Four for the temporary use of the tracks of Big Four; and from performing [fol. 50] or in any wise carrying out the contract executed by it on December 7th, 1928, with The Cleveland Union Terminals Company providing for the use by Wheeling of the depot of The Cleveland Union Terminals Company as, if and when the same shall be completed.

(d) From doing any one or all of the acts authorized by the certificates of public convenience and necessity granted to Wheeling in Finance Dockets 7298 and 7299.

2. That a preliminary and temporary injunction issue restraining and enjoining until the further order of this Court the United States of America and the Interstate Commerce Commission from enforcing or applying or permitting to become effective the certificates of public convenience and necessity issued by the Interstate Commerce Commission under date of July 23rd, 1929, but dated as of July 9th, 1929.

3. That this Court adjudge, order and decree that the certificates of public convenience and necessity issued by the Interstate Commerce Commission in Finance Dockets 7298 and 7299 on July 23rd, 1929, but dated as of July 9th, 1929, are in violation of the legal rights of your complainant and are null and void and without warrant in law, and that the same be set aside and annulled.

4. That upon final hearing hereof such injunction be made permanent.

5. That your complainant have such other and further relief as may be just and equitable in the premises.

And to the end that complainant may obtain the relief to which it is justly entitled, may it please your honors to grant to the plaintiff writs of subpœna directed to the defendants commanding them and each of them to appear [fol. 51] herein and answer the allegations contained in this amended bill of complaint, and to abide and perform such orders or decrees as this Honorable Court may make in the premises.

The Pittsburgh & West Virginia Railway Company, Complainant, by F. E. Taplin, President. C. F. Taplin, H. H. Hoppe, 1520 Union Trust Building, Cleveland, Ohio, Attorneys for Complainant.

Duly sworn to by F. E. Taplin. Jurat omitted in printing.

[fol. 52] EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298*

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Submitted June 17, 1929. Decided July 9, 1929

1. Certificate issued authorizing the Wheeling & Lake Erie Railway Company (a) to operate in passenger and allied services a proposed connecting track and passing siding of the Cleveland Union Terminals Company; (b) to acquire passenger station facilities and service in the union depot of the Cleveland Union Terminals Company, and (c) to operate in passenger and allied services temporarily a portion of an industrial siding track of the Wheeling & Lake Erie Railway Company, tracks and station facilities of the Erie Railroad Company, and tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, all in the city of Cleveland, Cuyahoga County, Ohio.

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*This report also embraces Finance Docket No. 7299, Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

2. Certificate issued permitting the Wheeling & Lake Erie Railway Company to abandon a portion of its line of railroad, including its Ontario Street passenger station, in the city of Cleveland, Cuyahoga County, Ohio.

Andrew P. Martin and Charles F. Close of Squire, Sanders & Dempsey, for applicant.

[fol. 53] H. H. Hoppe and C. F. Taplin for Pittsburgh & West Virginia Railway Company, and Charles W. Stage, W. H. Boyd, and H. H. McKeehan for Cleveland Union Terminals Company, interveners.

Randolph H. Nexson for State of New York Department of Public Service.

Carl F. Shuler for city of Cleveland, Ohio.

Report of the Commission

By the COMMISSION:

By application filed in Finance Docket No. 7298 on December 8, 1928, under paragraph (18) of section 1 of the interstate commerce act, the Wheeling & Lake Erie Railway Company, a carrier by railroad subject to the act seeks a certificate of public convenience and necessity authorizing (a) the operation by it in passenger and allied services of a proposed connecting track and passing siding, aggregating approximately 1,575 feet, of the Cleveland Union Terminals Company, hereinafter called the Terminals Company; (b) the acquisition of passenger station facilities and service in the union depot of the Terminals Company, and (c) the operation, temporarily, of a portion of an industrial siding track of the applicant, approximately 612 feet; of tracks of the Erie Railroad Company aggregating approximately 5,363 feet, and station facilities of that company; and of tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, hereinafter called the Big Four, aggregating approximately 6,744 feet, all in the city of Cleveland, Cuyahoga County, Ohio. On the same date, the Wheeling & Lake Erie filed an application in Finance Docket No. 7299, under the same paragraph and section of the act, for a certificate of public convenience and necessity permitting [fol. 54] abandonment by it of a portion of its line of rail-

road, approximately 1,035 feet, including its Ontario Street passenger station, in the city of Cleveland. Petitions of intervention were filed by the Pittsburgh & West Virginia Railway Company, sometimes hereinafter called the protestant, as a minority stockholder of the applicant, and by the Terminals Company. Appearance was entered on behalf of the Department of Public Service, State of New York, but that body did not actively participate in the proceedings. The applications were heard jointly, briefs have been filed, and oral argument has been had.

Briefly stated, the purpose of the applicant is to abandon its present passenger terminal, to operate temporarily into the passenger station of the Erie, and to acquire for a period of 100 years the right to use the facilities and services of the new depot of the Terminals Company when construction of that depot has been completed. The land constituting the right of way which contains that portion of the line to be abandoned, together with certain land leased by the applicant, is required by the Terminals Company for the construction of the east approach to the new depot authorized by us in our report on rehearing in The Cleveland Passenger Terminal Case, 70 I. C. C. 659.

Under date of November 27, 1928, the applicant entered into an agreement with the Terminals Company which recites the facts that the applicant owns and operates a line of railroad extending into the city of Cleveland; that in the opinion of the applicant its Ontario Street passenger station in the near future will become unsuitable and unsafe for use, necessitating the rebuilding thereof or the substitution therefor of other passenger station facilities in the [fol. 55] same vicinity; that the Terminals Company is engaged in the construction of a passenger terminal immediately north of the Ontario Street passenger station of the applicant; that the Terminals Company is willing to furnish to the applicant passenger station facilities in the said terminal, and in the interval between the date of vacation of the Ontario Street station by the applicant and the date of completion of the terminal will furnish to the applicant at the sole cost and expense of the Terminals Company such passenger station facilities and service as may be acceptable to the applicant, and that it is in the interest of the traveling public served by the applicant that it should have the ad-

vantage of the facilities offered by the Terminals Company and particularly the advantage incident to direct connection with trunk lines entering the terminal. The agreement then provides that the Terminals Company will furnish to the applicant, in conjunction with such other railroad companies to which rights of user may be granted, all of the passenger facilities and service (other than coach yard) usually furnished at passenger stations, including, inter alia, the following: (a) The handling by the Terminals Company's locomotives and crews of all applicant's trains between the point of connection of the applicant's tracks with the tracks of the Terminals Company and the depot, including the placing of mail cars for loading of outbound mail in advance of the departure of trains, and the heating, when necessary of trains after arrival at and prior to departure from the station; (b) the furnishing of information, by clerks, bulletin boards, notices, and otherwise as to the arrival and departure of the applicant's trains; (c) the sale of and accounting for all passenger tickets; (d) the handling of baggage; (e) the receiving and dispatching of United [fol. 56] States mail, railroad mail, newspapers, company material and supplies, handled in baggage service to and from the applicant's trains; (f) the receipt and delivery of milk in baggage cars on inbound passenger trains in the manner now employed by the applicant, and the loading of empty milk cans for return movement; (g) the furnishing of ample space for the receipt, delivery, and storage of express shipments via the applicant's lines, and (h) access to station facilities, facilities for stocking diners and business cars during the period that such facilities are provided for the proprietary or user companies, and reasonable locker space for conductors and train men.

The Terminals Company will, at its sole cost and expense, construct and maintain a connecting track, together with a run-around track, between its tracks and the tracks of the applicant.

The applicant will pay in full consideration for all of the facilities and service to be furnished by the Terminals Company, in monthly installments, the sum of $20,000 per annum for a total of not more than 3,000 trains containing in the aggregate not more than 14,000 cars, to or from the terminal from points of origin or to points of destination on the pres-

ent lines of the applicant and moving over the same, or to or from Pittsburgh or Connellsville or points between Pittsburgh or Connellsville and the present lines of the applicant, on lines constructed, acquired, controlled, or operated by the applicant extending from Pittsburgh to Connellsville, or points westerly thereof, to a connection or connections with the present lines of the applicant at Jewett, Ohio, or points southerly or easterly thereof and moving over the applicant's lines, such rental to be increased for any year in the proportion by which the number of such trains exceeds [fol. 57] 3,000 or the number of cars exceeds 14,000 in such year. A car or train moved in loaded and out empty, or vice versa, shall be counted as one car or one train, respectively.

The applicant's trains may also include cars from points of origin or to points of destination on extensions of or on lines connecting with the present lines of the applicant other than Pittsburgh and Connellsville and points westerly thereof, which cars handled into or through the terminal shall be paid for upon the same per-car basis as the cars handled into or through the terminal for the account of the proprietary companies of the terminal.

It is agreed that temporary passenger station facilities will be furnished the applicant in the Superior Avenue station of the Erie; that the Terminals Company will secure for the applicant the right to operate over the tracks of the Erie and the Big Four between that station and the point of connection between the tracks of the Erie and the applicant, and that the obligations of the various parties shall be incorporated in an agreement or agreements, copies of which shall be attached to this agreement.

In the event the applicant, for any reason, shall claim that the facilities or service furnished by the Terminals Company are unsatisfactory or inadequate, and the parties are unable to come to any agreement in regard thereto, the matter shall be submitted to arbitration. Should the applicant be dissatisfied with the award of the board of arbitrators it shall have the option to require the Terminals Company, upon 60 days' written notice, to pay to it as liquidated damages the cost of constructing (exclusive of the cost or value of land) upon the property of the applicant at a site to be [fol. 58] chosen by it, an adequate passenger station, the

cost of which shall not exceed $200,000, and upon completion of such passenger station both parties shall be relieved of any further obligation under this agreement.

The agreement is for a term of 25 years from the date of beginning the furnishing of the facilities and service by the Terminals Company, subject to the right of the applicant, upon six months' written notice, to renew it for another period of 25 years upon the same terms and conditions, except that for the renewal period the rental shall be increased to the extent, if any, which may be justified by the increase in operating costs directly attributable to the service rendered by the Terminals Company for the applicant, such increase to be determined by comparing the average cost of furnishing the service during the first 5-year period of the original 25-year term with the average cost of furnishing such service during the last 5-year period thereof. If the agreement is renewed after 25 years the applicant shall have the option to renew the agreement, upon not less than one year's written notice, for a further period of 50 years from the date of expiration of the renewal period, upon such terms and conditions as may be mutually agreed upon, or in the event of failure to agree then as shall be determined by arbitration, the applicant reserving the right not to avail itself of the option if the award is unsatisfactory to it. During the original term of 25 years and the renewal period of 25 years the agreement may be terminated at the end of any 5-year period on not less than one year's notice in writing given by the applicant to the Terminals Company. The execution of the contract is formally approved by the New York Central Railroad Company, the Big Four, and the New York, Chicago & St. Louis Railroad Company, hereinafter [fol. 59] called the Nickel Plate, as stockholders of the Terminals Company.

Under date of December 5, 1928, an agreement was executed between the applicant and the Erie under which the former is permitted to use the facilities of the Superior Avenue passenger station of the latter, together with certain approach tracks specifically described. Provision is made in detail for compensation for the use of the various facilities and tracks named in the agreement on a user or percentage basis which need not be described here. The term of the agreement will begin five days after receipt of writ-

ten notice from the applicant to the Erie that the former is ready to use the facilities and tracks, and will continue until the Terminals Company is prepared to furnish facilities and service under the agreement described above, when it may be terminated upon five days' notice by either party to the other.

Under date of July 25, 1928, the applicant entered into an agreement with the Big Four, effective as of December 7, 1928, under which the former may operate its passenger trains over certain tracks of the latter for the purpose of gaining access to the Superior Avenue station of the Erie. This agreement provides for a flat charge of $2.65 per train per round trip, not including movements of switch engines for placement or removal of cars or trains, or for movements of mail cars placed in advance of the movement of trains. Provision also is made for the payment by the applicant of necessary pilots, and additional costs incident to the operation of the applicant's trains. The provisions for commencement and termination of the term of the contract are similar to those in the Erie contract.

On December 7, 1928, an agreement was executed between the Terminals Company and the applicant under which the [fol. 60] former assumed all of the obligations imposed upon the latter under the contracts with the Erie and the Big Four. On the same date the applicant entered into an agreement with the Cleveland Terminals Building Company, hereinafter called the Building Company, under which it gave to that company a 5-year option to purchase applicant's lands and interests in lands under and adjacent to the portion of its line herein sought to be abandoned for the sum of $1,600,000. The Building Company has agreed to give to The Terminals Company a perpetual easement over such lands, constituting the east approach to the union depot, for the nominal consideration of $1.

In support of its contention that the plan proposed by it will serve the public convenience and necessity the applicant states that the operation on its behalf of the passenger station facilities of the Terminals Company will be justified by the probable effect on the business of the existing lines of the applicant, as it will provide facilities and service for its patrons far superior to those now furnished at the Ontario Street passenger station or which could be fur-

nished by the applicant at that location. The applicant's passengers will be able to make connections with the trains of the New York Central, Big Four, and Nickel Plate without leaving the station, also with local rapid transit lines which will operate into the station, and such passengers will be placed closer, by some 500 feet, to the downtown business section of Cleveland as well as to street car lines and busses operating into the public square. It is believed that this will tend to retain to the applicant a part of its passenger traffic into and out of Cleveland which otherwise may be lost to it. Further, the applicant estimates that the rental of $20,000 per annum to be paid by it for the handling of [fol. 61] not more than 3,000 trains containing in the aggregate not more than 14,000 cars will be substantially less than the probable cost to it of carrying charges on the lands, and carrying charges, depreciation, maintenance, and operation of the buildings, tracks, and equipment necessary to provide it with adequate station facilities. At the present time the applicant is handling at Cleveland approximately 2,503 trains per annum with an average of 3.3 cars per train.

By its petition of intervention filed prior to the hearing, and by supplement thereto filed at the hearing, the Pittsburgh & West Virginia alleges that the action proposed by the applicant herein is prejudicial to the public interest, the applicant, and its stockholders, and is unlawful and illegal because (1) it purports to be authorized by directors who have been and are unlawfully and illegally holding office by reason of the fact that they were elected by votes of stock owned by the Baltimore & Ohio Railroad Company, the New York Central Railroad Company, and the Nickel Plate, which companies are competitors of the applicant, and which stock was acquired contrary to the laws of Ohio and pursuant to a preconceived plan, agreement, and conspiracy to suppress competition, restrain trade, and create a monopoly; and because such stock was acquired in violation of certain laws of the United States; (2) the agreements between the applicant and the Erie, the applicant and the Big Four, the applicant and the Terminals Company, and the applicant and the Building Company, were made without first securing the consent of the holders of two-thirds of the applicant's stock as required by the laws of Ohio; (3) the contract between the applicant and the Build-

ing Company is a proposed sale to and purchase by the Terminals Company of a part of the applicant's railroad in [fol. 62] violation of the laws of Ohio; (4) the contracts under which the applicant proposes to use the facilities and tracks of the Erie and Big Four, and use the facilities and service of the union depot are leases by those companies to the applicant which were made without first securing the consent of the holders of two-thirds of the applicant's stock as required by the laws of Ohio; (5) it is an attempt by the directors of the applicant elected as such by votes of the stock held by the Baltimore & Ohio, New York Central, and Nickel Plate to change one of the termini of the applicant's line and to extend the applicant's line of railroad beyond its previously designated termini without first obtaining the consent of the holders of two-thirds of the applicant's stock as required by the laws of Ohio; (6) it is an attempt on the part of the Baltimore & Ohio, New York Central, and Nickel Plate, through their control of the applicant and 12 of its directors, to acquire for the Terminals Company, which is controlled by the New York Central and the Nickel Plate, the applicant's Ontario Street station site at a price satisfactory to themselves but far less than the fair and reasonable value thereof or the best price obtainable therefor; (7) the said directors were not and are not qualified to act in these matters by reason of their interest therein due to the fact that they held and hold their offices by virtue of the votes of stock owned by the New York Central and the Nickel Plate, which companies own and control the Terminals Company and are under obligation to that company to obtain for it the property sought to be abandoned by the applicant; and (8) it is an attempt on the part of the Baltimore & Ohio, the New York Central, and the Nickel Plate to force the applicant to use the facilities of the Terminals Company and thereby contribute to the excessive cost of [fol. 63] erecting, maintaining, and operating the Terminals Company's railroad and union depot.

While the applicant has answered the allegations of the protestant relating to alleged violations of the laws of Ohio, it contends that we are without jurisdiction to adjudicate those matters, and with this contention we agree.

The outstanding stock of the applicant consists of 118,823 shares of prior-lien, 102,324 shares of preferred, and 337,492

shares of common, a total of 558,639 shares. During the fall of 1926 and the spring of 1927 the New York Central and the Nickel Plate each acquired 38,398 shares of prior-lien, 4,933 shares of preferred, and 56,000 shares of common, and the Baltimore & Ohio acquired 38,397 shares of prior-lien, 4,934 shares of preferred, and 56,000 shares of common, so that each of those carriers owned 99,331 shares of a total of 297,993 shares. Under the applicant's articles of incorporation the holders of the prior-lien stock have the right to elect a majority of the directors to be elected at any meeting of the stockholders held for that purpose "whenever and as often as the corporation shall have failed to pay dividends at the rate of 7 per cent per annum on the prior-lien stock for five consecutive years ended on the quarterly dividend date next preceding such meeting," and the holders of all three classes of stock voting together as a single class are entitled to elect the remaining directors to be elected at such meeting. No dividends had been paid on the prior-lien stock. At the stockholders' meeting of May 25, 1927, it was decided to reclassify the board of directors, and the holders of the prior-lien stock elected eight of the 15 directors. Four of the remaining seven were elected by the holders of the [fol. 64] three classes of stock voting together, and the protestant and others elected three.

On April 16, 1927, previous to the meeting of the stockholders referred to above, certain officials of the Baltimore & Ohio, the New York Central, and the Nickel Plate, filed applications with us under paragraph (12) of section 20a of the act for authority to hold positions as directors and officers of the applicant while continuing to hold similar positions previously authorized by us with their respective companies. These applications were denied by our report and order dated May 8, 1928. Directors of Wheeling & Lake Erie, 138 I. C. C. 643.

On May 17, 1928, we issued complaints against the Baltimore & Ohio, New York Central, and Nickel Plate charging that those carriers violated section 7 of the Clayton Antitrust Act by the acquisition of applicant's stock. Following hearing and investigation we found that those carriers had violated the antitrust act and entered orders under date of March 11, 1929, requiring them to cease and desist from such violations and to divest themselves of the stock

which they had acquired, such divestment to be accomplished in such manner as might be approved by us within 90 days from the date of our orders. Interstate Commerce Commission v. Baltimore & O. R. Co., 152 I. C. C. 721. On March 12, 1929, one day subsequent to the date of our report and orders, and, as stipulated in the record, one day prior to service of said report and orders upon the respondents, the applicant's stock held by the Baltimore & Ohio and the New York Central was transferred to certain individuals for the benefit of the Alleghany Corporation, a company controlled by O. P. and M. J. Van Sweringen.

At the meeting of the applicant's stockholders on May 23, 1928, the stock held by the three carriers named above [fol. 65] was voted in a manner similar to that followed at the meeting of May 25, 1927, the prior-lien stock electing directors to three of the five vacancies, all classes of stock voting together electing one director, and the protestant and other stockholders electing one.

The protestant contends that inasmuch as the Baltimore & Ohio, New York Central, and Nickel Plate held their stock in violation of the provisions of section 7 of the Clayton Act, the election of directors by the votes of that stock was illegal; that, therefore, the action of the directors in approving the action proposed herein was illegal and that, such being the fact, we should deny the applications. No allegation of violation of the provisions of paragraph (12) of section 20a of the interstate commerce act is made.

The applicant argues that we are without jurisdiction to try the title of a director to his office, and that in any event we should refuse to entertain jurisdiction thereof in this proceeding as it constitutes a collateral attack upon the rights of the directors to hold and exercise the duties of their offices, which, by the weight of authority is not permitted even in a court of law; that our regulations governing the filing of applications under paragraph (18) of section 1 of the act do not even require the submission of copies of resolutions of the board of directors authorizing the filing of such applications; that assuming that the elections were invalid, the majority directors continued to be lawful directors by virtue of their prior elections, and if they acquired no title to their offices in 1927 and 1928 their precedent terms of office have never expired; that unless

the contention last stated be accepted the applicant has actually been without directors since 1927 and every resolution passed since then has been a nullity; and that until [fol. 66] there had been a finding by some properly constituted authority that the holding of applicant's stock by the three trunk lines was illegal no valid objection can be urged to the exercise by them of the ordinary incidents of stock ownership, one of which is the election of directors.

Section 7 of the Clayton Antitrust Act provides, in part:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or to tend to create a monopoly of any line of commerce.

It is clear that before a carrier can be held to have violated the provisions of this law there must be a finding of the fact that the acquisition by it of stock of another carrier may be to substantially lessen competition, etc. Such a finding of fact was made by us on March 11, 1929, subsequent to the commencement of the present proceedings, and we neither made that finding retroactive nor did we find that the acts of the directors elected by the stock owned by the three trunk lines should be nullified. Under the circumstances we are of the opinion that the contentions of the protestant in this respect are without merit. In view of this finding it will be unnecessary to discuss the remaining points raised by the applicant.

The protestant attacks the contract between the applicant and the Terminals Company on the ground that the rental charge provided therein, namely, $20,000 per annum, is so low as to be discriminatory against other carriers using or which may use the terminal facilities, and con- [fol. 67] tends that in the event of a finding by us of the existence of such discrimination at any time in the future the contract would be worthless so far as the applicant is concerned and it might be required to pay a rental far in

excess of its ability, resulting in receivership. The applicant's president testified that in his negotiations with the Terminals Company he stated that $20,000 per annum was the maximum that his company could afford to pay; that the cost of operating the present station with its inadequate facilities for serving the public is approximately $24,000 per annum; that if the applicant continued to occupy the present passenger station site it would be necessary to replace the existing station building with one costing approximately $170,000, and that the cost of operating such a station would be approximately $38,000 per annum.

The applicant argues that inasmuch as the three proprietary lines which are the sole stockholders of the Terminals Company, and will be the only cotenants of the applicant, have formally approved the contract under which the applicant will avail itself of the facilities and service of the union depot, they are estopped to claim that the contract is discriminatory against them; also that the Terminals Company, which is a party to the contract and a party to these proceedings, is estopped to make such a claim. On brief, counsel for the Terminals Company admits that the Terminals Company will not make a profit under the contract, "but, in view of all the circumstances, and all of the considerations entering into the contract, we submit that it is reasonable and fair, and under the same considerations it is made in the public interest." Evidence was submitted by the Terminals Company tending to show that the proposed rental approximates the out-of-pocket cost to it of [fol. 68] furnishing facilities and service to the applicant. It is clearly apparent that if the applicant is to continue operating a passenger station at its present site such operation can not be performed over tracks at the same level as the Terminals Company's tracks. The applicant can not operate above the present level because of the fact that its trains could not ascend to the higher level until after they had passed under the Eagle Avenue viaduct, which was constructed by the Terminals Company as required by an ordinance of the city of Cleveland, as the distance between the viaduct and the nearest track to be installed by the Terminals Company is so short that a grade of approximately 13 per cent would be required. This would create an admittedly impossible operating condition. If the ap-

plicant retains its tracks at their present level the Terminals Company will be obliged to construct its tracks below that level. In the latter event the additional cost to the Terminals Company for construction would be approximately $10,000,000, and about two years additional time would be required for the completion of the terminal. In addition, the station tracks and platforms of the Terminals Company would have to be constructed on a grade of approximately 0.56 per cent, resulting in a dangerous situation and more difficult operation. While these facts are not set out in the contract it can not be doubted that they were in the mind of the Terminals Company when the contract was made.

It is clearly apparent that the contract is favorable to the applicant, yet the protestant, as a minority stockholder of the applicant, appears in the unusual position of objecting to that contract on the ground that it is favorable. On brief, protestant quotes various excerpts from the interstate commerce act as showing our jurisdiction over the [fol. 69] Terminals Company, the illegality of carriers according undue or unreasonable preference or advantage, etc. But paragraph (4) of section 3 of the act, quoted by the protestant, under which we are authorized to require a carrier owning terminal facilities to permit the use thereof by another carrier or carriers, provides that such use shall be accorded "on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required to be ascertained on the principle controlling compensation in condemnation proceedings." In the present case the carriers have agreed upon the consideration to be paid, and each of the prospective cotenants of the applicant has formally approved that agreement. In Missouri-Kansas-Texas R. R. Co. v. K. C. T. Ry. Co., 104 I. C. C. 203, 227, we said:

It also is contended that to admit petitioner to the terminals upon terms other than those provided by the operating agreement and applicable to the proprietary lines would constitute an undue preference of petitioner and undue prejudice to the proprietaries or an unlawful discrimination against the latter. This apparently assumes, what ultimately might be found to be or not to be the fact (and

what respondent believes would not be the fact), that the terms to be accorded would be more favorable than the contract terms. Be that as it may, what would be true of a single owner of the terminals would be true of virtually joint owners, including a subsidiary terminal company, and as between the mutual terms upon which the proprietary joint use is had and other terms accorded an outside line, as distinguished from discriminating terms accorded two or more outside lines, there would be no ground for a predication of undue prejudice and preference or unjust discrimination within the meaning of the act. See Louisville & Nash. R. R. v. United States, 242 U. S. 60.

[fol. 70] In the present case there appears to be no possibility of attack upon the terms of the contract. The protestant does not seriously controvert the fact that the public convenience and necessity would be better served by the applicant's using the facilities and service of the union depot, nor, on the record before us, can that fact be doubted.

While the protestant contends that the rental terms unduly favor the applicant, it takes the opposite view of the proposed sale price of the applicant's vacated lands, holding that such price unduly favors the Building Company.

The allegation of inadequate consideration for the lands and interests in lands of the applicant to be sold to the Building Company in the event of abandonment of the Ontario Street passenger station is strongly pressed by the protestant and in fact appears to form the main protest as a whole. As stated above, the applicant proposes to sell its lands to which it has title in fee simple or in which it has leasehold or reversionary interests, for the sum of $1,600,000. The protestant produced two witnesses who testified that the lands and interests therein, including air rights, are worth $7,125,000 and $7,500,000, respectively. The applicant, while contending that we are without jurisdiction over the sale of the lands in question, on rebuttal produced three witnesses, and the Terminals Company produced a like number, who testified that the value of the lands and interests, except air rights, range from $1,374,796 to $1,600,000, the last named figure including the consideration that the lands are adjacent to the proposed terminal. All of these six witnesses considered the air rights in that

locality to be without value because of the excessive cost and impracticability of placing a superstructure over the throat of the terminal yards.

[fol. 71] Paragraph (20) of section 1 of the act provides that "The commission shall have power to issue such certificate (permitting abandonment) as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, * * * and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." In numerous contested cases we have authorized abandonment on the condition that the applicant shall offer to sell the line to be abandoned to any person, firm, or corporation willing to purchase it at not less than the fair net salvage value for continued operation. The reason for such a condition is obvious, and it clearly is based upon the public convenience and necessity. The protestant herein does not undertake to show in what manner the public convenience and necessity are affected by the sale of the properties involved in Finance Docket No. 7299, but contends that where the abandonment and sale are involved in the same general transaction we should see that the applicant receives a fair and reasonable value for the property before permitting abandonment. In view of the plain wording of the statute we are of the opinion that on the facts shown by this record we are without jurisdiction to prescribe the price at which the applicant in these proceedings must dispose of its properties after abandonment.

Upon the facts presented we find (1) that the present and future public convenience and necessity require the Wheeling & Lake Erie Railway Company (a) to operate in passenger and allied services a proposed connecting track and passing siding of the Cleveland Union Terminals Company; (b) to acquire passenger station facilities and service in the union depot of the Cleveland Union Terminals Company, and (c) to operate in passenger and allied services [fol. 72] temporarily a portion of an industrial siding track of the Wheeling & Lake Erie Railway Company, tracks and station facilities of the Erie Railroad Company, and tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, all in the city of Cleveland, Cuyahoga County, Ohio, said properties and operations being de-

scribed in the application in Finance Docket No. 7298; and (2) that the present and future public convenience and necessity permit the Wheeling & Lake Erie Railway Company to abandon the portion of its line of railroad, including its Ontario Street passenger station, all in the city of Cleveland, Cuyahoga County, Ohio, described in the application in Finance Docket No. 7299. Appropriate certificates will be issued.

LEWIS, Chairman, concurring:

Public convenience and necessity require the entrance of the Wheeling and Lake Erie into the union terminal station. This is the immediate and pressing consideration now before us. My only diversion from the decision of the majority rests in the fact that the future of the Wheeling and Lake Erie and its ability to serve the convenience of the city of Cleveland are not, it seems to me, sufficiently safeguarded. The Act empowers us to attach conditions to authorizations and we do on occasion require provisions as a condition precedent. It is my thought that we should have required a reconstruction of the contract between the carrier and the Terminals Company.

Doubts already have been expressed as to whether this contract, which gives to the carrier a preferential price or rate for service as against proprietary and other carriers, would stand up against attack. These contingencies may never materialize, but we had the opportunity to greatly [fol. 73] strengthen the position of the carrier and also safeguard the convenience of the city of Cleveland. The opportunity should not have been brushed aside without an effort to bring into the contract some obvious facts.

I am fully aware of the testimony of the president of the carrier to the effect that the $1,600,000 sale price set on its property was a fair and reasonable price determined by himself and the carrier's executive committee and that this was quite apart from the $20,000 service contract; and that the $20,000 was all the Wheeling and Lake Erie could pay for the service. This does not change one iota the obvious. Does any one imagine for a moment that the Terminals Company and the Terminal Building Company were moved by the financial limitations of the Wheeling and Lake Erie

to such an extent that they gave it such a preferential contract? I do not observe such charity operating in this practical world in which these companies are proceeding. There is in my mind no doubt that, so far as those with whom the carrier dealt, the $1,600,000 paid by the Cleveland Terminal Building Company, a noncarrier corporation, and the $20,000 service contract made by the Terminals Company, tie in together; that jointly they are in consideration not only of the land conveyed and the carrier's giving up its opportunity to maintain a down-town station, but also are the result of the practical necessity of getting the Wheeling and Lake Erie out of the way of a successful and early working out of the terminal station plans. The carrier occupied a blocking location, intensified by new conditions created by the city of Cleveland building the Eagle Avenue viaduct. This dictated the two deals. I think that a strong suggestion or even a requirement that this be stated in the service con-
[fol. 74] tract would have been acceded to. I do not doubt the intention or the purpose of those who are in control of the Terminals Company to carry out to the letter its service contract. But the control of the Terminals Company will change. Persons or interests for various reasons that may arise may bring into issue the terms of the contract. The position of the Wheeling and Lake Erie certainly would have been greatly strengthened by such an admission and inclusion of this consideration as part of the contract. This certainly would have been so in proceedings before this Commission, whose membership changes with considerable rapidity.

McMANAMY, Commissioner, concurring:

Eight years ago (70 I. C. C. 659) we found that public convenience and necessity required the construction and operation of a terminal passenger station at the public square in the City of Cleveland. We there said:

It is conceded by all parties that the existing passenger terminal facilities are antiquated and wholly inadequate.

That condition has become progressively worse until at the present time it is difficult to adequately describe the inconvenience to the City of Cleveland which results from

being forced to use during all these years passenger terminal facilities conceded to be antiquated and inadequate eight years ago.

Under the authority there granted the work of constructing the facilities authorized has been undertaken and is approaching completion. The certificates here granted are to remove one of the obstacles to the final completion of the project and to permit its use by the Wheeling. That this is required by public convenience and necessity there can be no doubt.

[fol. 75] My concurrence in the granting of these certificates is not to be understood as indicating approval of the financial structure which has been erected to carry on this work. It is based wholly upon the conclusion that the rights of the people of the City of Cleveland to safe and adequate passenger terminal facilities are paramount, and that the desires of private financial interests for tactical advantage should not be permitted to further delay the completion of this much-needed facility. Certainly the rights of private interests should be protected, but it does not appear that the rights of any private interests are here invaded. It is admitted by all parties that for the present and the immediate future the arrangements here approved are fair to the Wheeling. In fact one of the chief concerns of the interveners is that the terms given to Wheeling are so favorable that it may not be permitted to retain them. Certainly the Wheeling should be protected in the permanent enjoyment of the rights here granted and I believe that could have been readily accomplished by suitable provisions in the contract and that such provisions should have been included. However, the possibility of the rights of the Wheeling being jeopardized in the future without an adequate legal remedy is too remote to justify denial of this application on that ground. I therefore concur in the conclusions reached by the majority.

EASTMAN, Commissioner, dissenting:

This controversy has become somewhat involved, but it can be reduced to simple terms. In 1921, when we first considered the proposed new union station in Cleveland, it was clear that the east approach would require the land

occupied by the passenger station of the Wheeling & Lake Erie. The Wheeling felt that it could not afford to use the new station, and intervened in opposition to the project. [fol. 76] At the first day of the hearing it was actively represented by counsel who exhibited an insight into the entire situation. Before the beginning of the second day's hearing, the proponents of the new station, upon agreement of the Wheeling to withdraw the protest executed a stipulation to the effect that any certificate of public convenience and necessity which we might issue should be "without prejudice or bar to or influence upon any rights of the railway company [The Wheeling] under the laws of the State of Ohio in relation to its present freight and passenger facilities in the City of Cleveland." Upon issue of our certificate, this stipulation was "ratified, confirmed and adopted" in a supplementary stipulation.

Much of the land which the new station and the west approach were to occupy was owned by the Van Sweringens. They conveyed it to the Terminals Company at cost plus carrying charges, subject to the reservation of air rights over 6.58 acres of the most valuable land in the station area, and in return for those air rights undertook to procure for the Terminals Company a perpetual easement over the east approach. The air rights were turned over to the Building Company, controlled by the Van Sweringens, and that company also assumed the obligation to procure the easement. To obtain this easement, control of the land occupied by the Wheeling's passenger station was essential. The Building Company, which was merely the Van Sweringens in another name, therefore assumed, in 1921, all risk in connection with this Wheeling property. This risk was greatly enhanced in 1925, when the Terminals Company agreed to the construction by the City of Cleveland of the Eagle Avenue ramp. Theretofore it would perhaps have been possible without undue expense for both the Terminals [fol. 77] Company and the Wheeling to use the latter's property, at different levels. After the construction of the ramp, this became impossible, except at enormous expense. The Building Company was, therefore, in a position where the Wheeling plainly had the whip hand and could have forced it to accept terms, in order to obtain the easement, which would have involved a very heavy sacrifice. It is

important to note that this risk was upon the Building Company, i. e., upon the Van Sweringens personally, and not in any way upon the Terminals Company or any of the other carriers.

In this emergency, and as nearing completion of the station made a settlement of this matter vital, the Van Sweringens, through the Nickel Plate and with the New York Central and Baltimore & Ohio, secured a controlling interest in the Wheeling's stock. It is a safe inference that the Cleveland station situation was an impelling, although by no means the only, motive in this acquisition. Thereafter, and not before, the proposed arrangement between the Wheeling and the Terminals Company which is now before us was arrived at.

In The Cleveland Passenger Terminal Case, 70 I. C. C. 659, 662-671, I expressed views as to the Cleveland station project and the wholly unnecessary opportunity for great private profit which the carriers concerned then bestowed upon the Van Sweringens. I need not go into that again. Nor shall I consider whether we have power to deny the certificates which are here sought, upon the ground that the agreement between the Wheeling and the Terminals Company was procured through an unlawful acquisition of control, except to say that I think the reasoning of the majority upon that point is clearly in error. We are required in a [fol. 78] Clayton Act proceeding to find whether the provisions of the Act "have been or are being violated." Our finding in Interstate Commerce Commission vs. Baltimore & Ohio R. Co., 152 I. C. C. 721, 737, was "that such acquisitions were therefore in violation of section 7 of said act". That finding related to the past as well as to the present, and in that sense was retroactive. It also related to transactions which began prior to the agreement which we are now considering. Moreover, that agreement was reached after we had assumed jurisdiction by the serving of our Clayton Act complaint.

However, while it may well be that we could deny these certificates upon the ground that the Wheeling's assent was procured through an illegal acquisition of control, I doubt whether the action of its directors was invalid on that account. It is, I think, a situation where we may be guided by our conception of the public interest. So far as the

public directly served is concerned, it will, I think, be in their interest to have the Wheeling enter and use the new union station. But we are concerned, also, with the interests of others who use the Wheeling's facilities and of its stockholders. It is not in the public interest that the Wheeling should be treated unfairly.

Looked at from that point of view it is my opinion that the transaction, considered as a whole, is fair to the Wheeling, provided it can be depended upon to stand up for the future. The terms for the use of the station are all that the Wheeling can afford to pay, but considerably less than might reasonably be charged. On the other hand the payment for the land is not all that the Wheeling might reasonably expect to obtain, considering not only inherent land values in the vicinity but also the damages resulting from [fol. 79] the loss of a well located and economical passenger station site. But can the terms for the use of the union station be depended upon for the future?

I expressed myself at some length upon the point involved in a dissenting opinion in Missouri-Kansas-Texas R. R. Co. vs. K. C. T. Ry. Co., 104 I. C. C. 203, 231-242. In my judgment a terminal common carrier, like the Terminals Company, is under the legal duty, in view of the provisions of the interstate commerce act, to treat all carrier users of its facilities equally, without giving any one of them an undue or unreasonable preference or advantage. Any contracts for the use of the facilities are made in the light of this statutory duty, and can in no way impair our right to enforce that duty, either upon our own initiative or upon complaint of any interested party. Here the terms offered the Wheeling admitedly give it a preference over other users of the station, and if it should be treated on equal terms with other users, the yearly payments would be far larger than those which are proposed and more than it can afford. Clearly the Wheeling ought not to be subjected to this danger, nor ought we to give our approval to a preferential contract for the use of the station which would violate the provisions of the interstate commerce act.

And there is a further point to consider. Why is the Terminals Company asked to assume the burden of permitting the use of its facilities at an unreasonably low charge? When the situation is analyzed, the answer to this

question is plain. It is being asked to do this to relieve the Building Company, i. e., the Van Sweringens, of part of the burden of a risk which they assumed in 1921 when they undertook to procure for the Terminals Company an easement over the east approach without knowing what it might [fol. 80] be necessary to pay the Wheeling in the process. The air rights furnished the consideration for this promised easement, and they have proven to be much more than ample recompense. There is no reason in law, morals or equity, and certainly none in public policy, why any of the burden of this personal risk should be lifted from the Van Sweringens and loaded upon the Terminals Company, and through that carrier upon the public which is served by it or by its carrier owners. The New York Central, incidentally, has by far the largest financial interest in the Terminals Company.

The certificates as sought should be denied, but they should be granted if an arrangement is made under which

1. The Wheeling will obtain the use of the new union station upon equal terms with other users.

2. The Building Company will contract to pay to the Wheeling each year, as part of the compensation for the latter's land, the amount by which its payment for the use of the station under such equal terms exceeds what it would have paid under the terms which we have been asked to approve.

3. The Building Company will pay to the Wheeling, as further compensation for the latter's land, the $1,600,000 here proposed.

The net effect of this suggested arrangement would be the same as that proposed, so far as the Wheeling is concerned, except that the danger that it might hereafter lose the benefit of part of what is proposed would be eliminated. Part of the burden of the proposed arrangement, however, would be shifted from the Terminals Company to the Building Company, where it properly and justly belongs.

[fol. 81] Taylor, Commissioner, dissenting:

It is plain that the applications here considered are largely, if not entirely, the outgrowth of the control by the Baltimore & Ohio, the New York Central and the Nickel

Plate, of the Wheeling & Lake Erie. The merits of that control have heretofore had the consideration of the commission and it was found contrary to law. The carriers were ordered to divest themselves of the stock by which such control was accomplished. The Baltimore & Ohio and New York Central attempted to anticipate our decision by an alleged sale of the one-third interest, which each of those companies owned in the joint control, to the Allegheny Corporation, a company controlled by the Van Sweringens. This action, although it may have brought about no real change in the personnel of the tripartite control of the Wheeling & Lake Erie, has left the Nickel Plate the residuary partner in its acquisition, controlled by the Van Sweringens, who also control the Nickel Plate, the Cleveland Union Terminals Company and the Building Company. Thus we have the situation of those two gentlemen trading with themselves. Under these conditions we should at least withhold approval of what is here sought, until our order requiring the Nickel Plate to divest itself of the Wheeling & Lake Erie stock has been fully complied with, and the Wheeling & Lake Erie restored to the control of lawful owners.

[fol. 82] Certificates of Public Convenience and Necessity

At a General Session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 9th day of July, A. D. 1929.

Finance Docket No. 7298

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Finance Docket No. 7299

Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

A hearing and investigation of the matters and things involved in these proceedings having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the Wheeling & Lake Erie Railway Company (1) to operate in passenger and allied services a proposed connecting track and passing siding of the Cleveland Union Terminals Company; (2) to acquire passenger station facilities and service in the union depot of the Cleveland Union Terminals Company; and (3) to operate in passenger and allied services temporarily a portion of an industrial siding track of the Wheeling & Lake [fol. 83] Erie Railway Company, tracks and station facilities of the Erie Railroad Company, and tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, all in the city of Cleveland, Cuyahoga County, Ohio, said properties and operations being described in the application in Finance Docket No. 7289 and the report aforesaid.

It is further certified, That the present and future public convenience and necessity permit the Wheeling & Lake Erie Railway Company to abandon the portion of its line of railroad, including its Ontario Street passenger station, all in the city of Cleveland, Cuyahoga County, Ohio, described in the application in Finance Docket No. 7299 and in the report aforesaid.

It is ordered, That the certificates aforesaid shall take effect and be in force from and after 30 days from the date hereof.

It is further ordered, That the Wheeling & Lake Erie Railway Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fols. 84-86] In United States District Court

[Title omitted]

Motion for Temporary and Preliminary Injunction—Filed August 7, 1929

To the Honorable Paul Jones, Samuel H. West, George P. Hahn, and John M. Killits, Judges of said Court, sitting in equity:

Now comes the complainant, The Pittsburgh & West Virginia Railway Company, by its attorneys, and moves the

court for a temporary and preliminary injunction as prayed for by the complainant in its Bill of Complaint herein.

C. F. Taplin, H. H. Hoppe, Attorneys for Complainant.

[fols. 87 & 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF THE WHEELING AND LAKE ERIE RAILWAY COMPANY TO THE AMENDED BILL OF COMPLAINT—Filed Sept. 3, 1929.

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

Now comes The Wheeling and Lake Erie Railway Company, a defendant herein, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the amended bill of complaint (hereinafter referred to as "bill of complaint"), and for its separate answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, says:

1. As to the allegations contained in Section I of said bill of complaint it denies that the certificates of convenience and necessity issued by the Interstate Commerce Commis- [fol. 89] sion in its Finance Dockets Nos. 7298 and 7299 were or are arbitrary or without warrant of law or void.

In this answer defendant adopts and will employ the nomenclature for the various corporations and individuals used in the bill of complaint as follows: The Baltimore & Ohio Railroad Company is hereinafter referred to as "B. & O."; The New York Central Railroad Company is hereinafter referred to as "Central"; The Lake Erie, Alliance & Wheeling Railroad Company is hereinafter referred to as "Alliance"; The New York, Chicago and St. Louis Railroad Company is hereinafter referred to as "Nickel Plate"; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company is hereinafter referred to as "Big Four"; Erie Rail-

road Company is hereinafter referred to as "Erie"; The Chesapeake and Ohio Railway Company is hereinafter referred to as "Chesapeake"; The Hocking Valley Railway Company is hereinafter referred to as "Hocking"; The Western Maryland Railway Company is hereinafter referred to as "Maryland"; The Cleveland Union Terminals Company is hereinafter referred to as "Terminals"; The Cleveland Terminals Building Company is hereinafter referred to as "Building"; O. P. and M. J. Van Sweringen are hereinafter referred to as "Van Sweringens"; the Interstate Commerce Commission is hereinafter referred to as "the Commission."

2. It admits all of the allegations contained in Section II of said bill of complaint, save and except that it denies that the plaintiff was a holder of record of any of the stock of this defendant prior to April 8, 1927.

3. As to the allegations of Section III of said bill of complaint it admits that it is an Ohio railroad corporation with its principal place of business in Cleveland, Ohio, and that it [fol. 90] is a resident and citizen of the State of Ohio, engaged as a common carrier in interstate commerce, and subject to the Interstate Commerce Act. It denies that one of its termini is its Ontario Street passenger station site in the City of Cleveland, Ohio, or that said site is specified as one of its termini in its articles of incorporation, and alleges that said terminus is the City of Cleveland, Cuyahoga County, Ohio. It denies that the property now owned by it lying northerly of Eagle Avenue in the City of Cleveland, Ohio, and bounded on the north by Huron Road, on the east by Ontario Street, on the south by Eagle Avenue, and on the west by Canal Road, was on the 3rd day of July, 1928, or still is, of the value of not less than $7,500,000, and alleges that the value of said property (including this defendant's leasehold interest in certain adjoining lands of an area of 5677 square feet, and this defendant's reversionary interest in land in the streets upon which its owned lands abut) was on the 3rd day of July, 1928, and still is, not to exceed $1,600,000.

It admits that when organized its authorized capital stock was $55,870,000, divided into classes of stock of the respective amounts set forth in said Section III, but alleges that

as of the date of filing said bill of complaint its outstanding capital stock was and still is as follows:

Prior Lien Stock	118,823 shares
Preferred Stock	102,324 shares
Common Stock	337,492 shares
Total	558,639 shares

As to the allegations concerning the rights, preferences, voting powers, restrictions and qualifications of said several classes of stock, this defendant alleges that said rights, preferences, voting powers, restrictions and qualifications [fol. 91] are prescribed and determined by the following provisions of Article IV of its Articles of Incorporation:

"The rights, preferences and voting powers, and the restrictions and qualifications thereof, of the several classes of the capital stock of the corporation are as follows:

"The holders of the Prior Lien Stock of the corporation shall be entitled to receive out of the net profits of the corporation, when and as declared by the Board of Directors of the corporation, cumulative dividends at the rate of, but not exceeding, seven per cent per annum from November 1, 1916, payable quarterly on the first days of February, May, August and November in each year. Such dividends upon the Prior Lien Stock shall be declared and paid or actually set apart, before any dividends on the Preferred Stock or on the Common Stock of the corporation shall be declared, set apart or paid, and shall be cumulative so that if in any fiscal year dividends upon the Prior Lien Stock at the rate of seven per cent per annum shall not have been declared and have been paid or a sum sufficient for the payment thereof set apart and appropriated to such payment, the deficiency shall be payable out of the net profits of the corporation for subsequent years, before any dividend, whether in cash, scrip, stock or otherwise, shall be declared, set apart or paid upon the Preferred Stock or the Common Stock.

"In the event of the dissolution, winding up or liquidation for any cause of the corporation, the holders of the Prior Lien Stock shall be entitled to receive out of the assets of the corporation the full par value of their shares

of the Prior Lien Stock and the cumulative dividends, if any, accrued and unpaid thereon, before any amount shall be paid to the holders of the Preferred Stock or of the Common Stock.

[fol. 92] "The holders of the Preferred Stock shall be entitled to receive, out of the net profits of the corporation remaining after payment in full of the cumulative dividends upon the Prior Lien Stock, when and as declared by the Board of Directors of the corporation, non-cumulative dividends at the rate of, but not exceeding, six per cent per annum from November 1, 1916, payable quarterly, half yearly or yearly in the discretion of the Board of Directors. Such dividends upon the Preferred Stock shall be declared and paid or actually set apart in each fiscal year before any dividends on the Common Stock of the corporation shall be declared, paid or set apart in such year.

"In the event of the dissolution, winding up or liquidation for any cause of the corporation, the holders of the Preferred Stock shall be entitled to receive, out of the assets of the corporation remaining after payment in full to the holders of the Prior Lien Stock of the amounts in such event payable to them as aforesaid, the par value of their shares of the Preferred Stock and in addition the amount of any dividends thereon, which shall have been declared but not paid, before anything shall be paid to the holders of the Common Stock.

"Except as hereinbefore provided, neither the Prior Lien Stock nor the Preferred Stock shall be entitled to participate in the earnings or assets of the corporation.

"If, after the payment in full of the cumulative dividends on the Prior Lien Stock and of the noncumulative dividends on the Preferred Stock, as aforesaid, there shall remain in any fiscal year net profits for such year or for any other fiscal year for which dividends in full shall have been paid or set apart (either currently during such year or subsequently thereto) on the Prior Lien Stock and on the Preferred Stock, such remaining net profits shall be applicable [fol. 93] to the payment of dividends on the Common Stock, when and as they shall be declared from time to time by the Board of Directors of the corporation.

"In the event of the dissolution, winding up or liquidation for any cause of the corporation, the holders of the

Common Stock shall be entitled to receive all the assets of the corporation remaining after payment in full to the holders of the Prior Lien Stock and of the Preferred Stock of the amounts in such event payable to them as aforesaid.

"The holders of the Prior Lien Stock shall have the right for a period of five years after the incorporation of the corporation to elect by vote of a majority in amount of the Prior Lien Stock present, in person or by proxy, at any meeting of the stockholders, a majority of the directors of the corporation to be elected at such meeting and also the right thereafter to elect in like manner a majority of such directors to be elected at any such meeting, whenever and as often as the corporation shall have failed to pay dividends at the rate of seven per cent per annum on the Prior Lien Stock for five consecutive years ended on the quarterly dividend date next preceding such meeting; and the holders of the Prior Lien Stock, the holders of the Preferred Stock and the holders of the Common Stock (voting together as a single class) shall be entitled to elect the remainder of the Directors to be elected. Except as above provided, the Prior Lien Stock, the Preferred Stock and the Common Stock shall have proportionately equal voting rights for all purposes."

Defendant denies the allegations of Section III of said bill of complaint in so far as they are inconsistent with said provisions of Article IV of said Articles of Incorporation.

[fol. 94] 4. Upon information and belief it admits the allegations contained in Sections IV to XI, both inclusive, of said bill of complaint.

5. As to the allegations contained in Section XII of said bill of complaint it admits that (largely by reason of participation in through routes with other carriers) it is now, and for the past ten years has been, engaged to some extent in competition with B. & O., Central and Alliance, and to a lesser extent with Nickel Plate and Erie; but denies that it is engaged in competition with Hocking and Chesapeake. It admits that to a limited extent the lines of B. & O., Central and Nickel Plate parallel the lines of this defendant, but it alleges that the lines of this defendant are to a considerable extent supplementary and complementary to the lines of B. & O., Central, Alliance, Nickel Plate and Erie, in

forming with said lines direct and through routes and channels of trade and commerce.

It admits that its lines connect with the lines of plaintiff at Pittsburgh Junction, Ohio, and that the lines of this defendant and of plaintiff form a direct and through route and channel of trade and commerce between Pittsburgh, Pennsylvania, and Toledo, Huron, Lorain and Cleveland, Ohio, and that to some extent the traffic over this route is competitive with the traffic handled by B. & O., Central, Alliance, Nickel Plate and Erie, but not with Hocking or Chesapeake; but it alleges that the plaintiff, in conjunction with other lines of railroad, is in active competition with this defendant, particularly in respect to the transportation of lake cargo coal to the lake ports on the south shore of Lake Erie and the transportation of commercial coal to consuming markets in the State of Ohio and adjoining states, which traffic constitutes a large part of plaintiff's business.

[fol. 95] 6. Upon information and belief it admits the allegations contained in Section XIII of said bill of complaint, excepting that it denies that Van Sweringens are now, or for some time past have been proposing the construction of additional electric railroads or rapid transits for the purpose of developing said lands and of furnishing additional transportation to and from the same and the Public Square in Cleveland.

7. In answer to the allegations contained in Section XIV of said bill of complaint defendant admits that Van Sweringens organized or caused Terminals to be organized under the laws of the State of Ohio for the purpose, among other things, of "purchasing or leasing depot grounds, and locating, constructing and maintaining a common or union station house, passenger or freight depot, or both, and terminal and connecting tracks for the use of steam railroads, or both steam and electric railroads; and for constructing, maintaining and operating in connection with its terminals and station, a terminal railroad with two or more tracks connecting the railroads of one or more companies"; but this defendant denies that Terminals was incorporated as a railroad company under the laws of Ohio or for the purpose of constructing or operating a railroad independent of said passenger station and terminal.

Defendant admits that the authorized capital stock of Terminals is $10,000, divided into 100 shares of the par value of $100 each, but denies that said stock is owned or controlled by Van Sweringens and denies that Van Sweringens control the corporations which now own or control said stock. This defendant admits that upon completion of Terminals' union depot, Terminals will operate as a union depot company for the handling into, out of, and through said union depot and over its appurtenant terminal and con- [fol. 96] necting tracks the trains and cars of its tenant railroads, but denies that Terminals is a common carrier, or will engage in interstate commerce as such, or that it is subject to the Interstate Commerce Act.

8. Upon information and belief, it admits the allegations of Section XV of said bill of complaint, save and except that it denies that the plans of Van Sweringens and/or Terminals contemplate the construction of a railroad.

9. It admits all the allegations contained in Section XVI of said bill of complaint, save that it says that it is without knowledge of the details of the provisions of the ordinance therein referred to, or of the obligations imposed upon Terminals thereby.

10. Upon information and belief it admits the allegations contained in Sections XVII and XVIII of the bill of complaint, save and except that it denies that Terminals proposes to construct or will construct a railroad. This defendant alleges that the only railroad tracks which Terminals proposes to construct or will construct will be terminal tracks or connecting tracks appurtenant to its union depot.

11. Upon information and belief, it admits the allegations contained in Section XIX of said bill of complaint, save and except that it says it is without knowledge as to whether or not O. P. Van Sweringen at any time dominated or controlled, or will at any future time dominate or control, Terminals and its policies.

12. Upon information and belief, it admits the allegations contained in Section XX of said bill of complaint.

13. It admits the allegations contained in Section XXI of said bill of complaint, save and except that it denies that

[fol. 97] Central, Big Four and Nickel Plate applied in said Finance Docket No. 1237 for authority for the erection, construction and maintenance of a railroad.

14. It admits the allegations of Section XXII of said bill of complaint, and alleges that said stipulation further provided as follows:

"That in the event any application is made by the Terminals Company, its successors or assigns, or the applicants herein, or any one or more of them for a right to cross or to fix the mode and manner of crossing the property, tracks, or right of way of the Railway Company at grade or above or below grade at any point north of the Cuyahoga River crossing of the Railway Company, in the City of Cleveland; the entire cost of and physical damages caused by such crossing shall be borne by the Terminals Company, its successors or assigns, or any one or more of the applicants herein who seek such right."

15. It admits the allegations contained in Section XXIII of the bill of complaint, save and except that it denies that said certificate of public convenience and necessity referred to therein contemplated or authorized the construction of an independent railroad. The language of said certificate is as follows:

"That the present and future public convenience and necessity require, and will require, the construction and operation of a terminal station and a line of railroad constituting the approaches thereto, in the City of Cleveland, Ohio, as described in the applications and the report aforesaid."

16. It admits the allegations contained in Section XXIV of the bill of complaint.

17. Upon information and belief, it admits the allegations contained in Section XXV of said bill of complaint.

[fol. 98] 18. As to the allegations contained in Section XXVI of said bill of complaint, it admits that Terminals constructed the Eagle Avenue ramp, but denies that this was a voluntary act upon its part, and alleges that Terminals was compelled to do so by the action of the City of Cleveland, under an ordinance amendatory of and supple-

mentary to Ordinance No. 47814. This defendant admits that the Eagle ramp as now constructed makes it impossible for Terminals and this defendant to use jointly this defendant's Ontario Street passenger station site.

19. Upon information and belief, it admits the allegations contained in Section XXVII of said bill of complaint, except that it is without knowledge as to the amount of money already expended by Terminals, or as to the amount of money which it must expend to complete the erection and construction of its union depot and appurtenant terminal tracks, and for want of information denies that such cost is or will be in excess of that required for the public convenience and necessity.

20. Upon information and belief, it admits the allegations contained in Section XXVIII of said bill of complaint, unless the plaintiff intends to aver therein that said projected railroad systems are proposed to be under the joint domination and control of B. & O., Central and Nickel Plate, or any two of them, which this defendant denies.

21. As to the allegations contained in Section XXIX of said bill of complaint, it admits that the plaintiff proposed an extension of its lines from a point near Pittsburgh, Pennsylvania, to a proposed connection with Maryland at Connellsville, Pennsylvania, which extension has now been [fol. 99] authorized by action of the Interstate Commerce Commission, but denies that the establishment and creation of a route and channel of trade from Toledo, Huron, Lorain and Cleveland, Ohio, and points west and south thereof, and from intermediate points to the Atlantic seaboard, at Baltimore, via said extension and Maryland would be of benefit to this defendant or would increase the competition between this defendant, on the one hand, and the B. & O., Central and Nickel Plate, on the other hand; but avers that the construction of such connection, and the routing of business via such route, will be of material disadvantage to this defendant.

22. As to the allegations contained in Section XXX of said bill of complaint, this defendant is without knowledge as to the alleged conspiracy or of the alleged motives or purposes of the alleged conspirators, therein set forth, and specifically denies that it has ever had or now has any

knowledge of any such alleged agreement or conspiracy, or of the time at which such alleged agreement or conspiracy was entered into, and further denies that it had any knowledge prior to February 7, 1927, that B. & O., Central and/or Nickel Plate were about to acquire or had acquired any of the stock of this defendant.

23. This defendant says that it is without knowledge of the allegations contained in Section XXXI of said bill of complaint to the effect that B. & O., without the consent of the Commission or of its stockholders, procured and purchased a controlling interest in Maryland, or that B. & O., Central and Nickel Plate purchased stock in this defendant without consent of their respective stockholders, or that any of said purchases were in furtherance of any agree-[fol. 100] ment or conspiracy. It denies that the failure of th Board of Directors of this defendant to declare any dividends until November 1, 1928 on any class of this defendant's stock was for the purpose of permitting B. & O., Central and Nickel Plate to accomplish in whole or in part any agreement or conspiracy; but on the contrary alleges that such action on the part of said Board of Directors was for the sole reason that its surplus at all times has been needed for paying off large sums of short term indebtedness created during and after the World War, for operating deficits, and for additions and betterments (which should be paid out of current earnings rather than out of capital obligations because of the capital structure of this defendant) and for maintaining the credit, and conserving the assets of this defendant), all for the benefit of the holders of its bonds, stocks, notes and other obligations.

It admits that between the dates of March 22, 1927 and April 21, 1927, both inclusive, there were transferred upon the books of this defendant to B. & O., Central and Nickel Plate, severally but not jointly or in common, shares of capital stock of this defendant as follows:

	Prior lien	Preferred	Common
Baltimore & Ohio	38,397	4,934	55,970
New York Central	38,398	4,933	55,970
Nickel Plate	38,398	4,933	55,985
Total	115,193	14,800	167,924

24. As to the allegations contained in Section XXXII of said bill of complaint, this defendant alleges that at the annual meeting of stockholders of this defendant held on May 25, 1927 the holders of prior lien stock present in person or by proxy (including the proxies covering the prior [fol. 101] lien stock owned by B. & O., Central and Nickel Plate), voting as a class, elected eight directors out of a total of fifteen directors elected at such meeting.

It admits that no dividends had been paid on any of said prior lien stock for the five consecutive years ended May 1, 1927, and that theretofore the right of the prior lien stockholders voting as a class to elect a majority of the Board of Directors had never been exercised by the holders of such stock, because prior to such time there had been no diversity of opinion or interest among the stockholders, and the proxy committee at all times had sufficient stock of all classes to elect a competent and disinterested board by voting all classes of stock as a single class. Defendant avers that at no time has the said proxy committee acted in such a manner as to deprive the holders of the prior lien stock, voting as a class, of the right to elect a majority of the Board of Directors conferred upon such stock under and pursuant to the articles of incorporation of this defendant. It denies that such right has been lost to the holders of such stock.

It admits that at said meeting of May 25, 1927 the remaining seven directors were elected by all stockholders present in person or by proxy voting together as a single class, and that the votes of the proxies of B. & O., Central and Nickel Plate, respectively, were cumulated and were cast for four directors, which directors (with three other directors) were elected. It admits that at the said meeting of May 25, 1927 certain objections were made by or on behalf of holders of preferred and common stock to the methods of electing directors and to the voting of stock owned by B. & O., Central and Nickel Plate.

[fol. 102] As to the allegations contained in said Section XXXII concerning the election of directors at the annual meeting of stockholders held May 23, 1928, this defendant alleges that at said meeting five directors were elected by the votes of the proxies of B. & O., Central and Nickel Plate and by the votes of other stock present in person or by proxy. This defendant avers that the following persons

(all of whom were members of its Board of Directors continuously from May 25, 1927 to May 8, 1929, and all of whom are still members of its Board of Directors with the exception of Bertram Cutler who resigned from said Board May 8, 1929): Warren Bicknell, Harris Creech, Bertram Cutler, George A. Coulton, W. M. Duncan, George Durham, F. H. Ecker, T. S. Grasselli, J. A. House, L. F. Loree, E. A. Petrequin, and G. A. Tomlinson (hereinafter referred to as "Old Directors") were duly elected, qualified and acting directors of this defendant on and continuously for a long time prior to May 25, 1927 and for a long time prior to the acquisition of capital stock of this defendant, as aforesaid, by Central, Nickel Plate and B. & O., save and except that one of said directors, to wit: George Durham, was elected by the remaining members of the board to fill a vacancy on May 20, 1927; and that on May 23, 1927 he duly qualified and has ever since acted as such director. Defendant further alleges that Article II, Section 1 of its regulations requires that each director shall hold office until his successor shall be elected and shall be qualified, and that said regulation is now in effect and has been in effect at all times since on or about December 14, 1916. Defendant alleges, therefore, that even if the Old Directors, or any of them, were illegally elected at the annual meetings of this defendant of May 25, 1927 or of May 23, 1928 (which this defendant, however, [fol. 103] specifically denies) nevertheless by reason of their lawful election and qualification prior to May 25, 1927, and by reason of said provisions of the regulations of this defendant, said Old Directors, and each of them, were continuously from May 25, 1927 and still are the duly elected, qualified and acting members of defendant's Board of Directors, with the exception of Bertram Cutler, who was a duly elected, qualified and acting member continuously from July 9, 1917 to May 8, 1929.

Except as admitted herein, defendant denies the allegations of said Section XXXII.

25. As to the allegations contained in Section XXXIII of said bill of complaint, this defendant admits that the Executive Committee of this defendant at a meeting held on July 3, 1928 resolved to recommend to the directors of this defendant that they accept an offer of Terminals to furnish this defendant with passenger station facilities and

service in Terminals' new union depot when the same should be completed, and in the meantime to provide this defendant with satisfactory temporary passenger station facilities and service, and that if an agreement was reached between this defendant and Terminals for such passenger station facilities and service, then as the property of this defendant lying northwest of Eagle Avenue would not be further required for railroad purposes, the Executive Committee resolved to recommend to the directors that said property be sold to Terminals (or to such person or persons for, or on its behalf, as it may designate) for $1,600,000.

It denies that said Executive Committee was composed of directors elected by the stock owned by B. & O., Central and Nickel Plate alone. It denies that the action of said Executive Committee was in furtherance of any agreement [fol. 104] or conspiracy whatsoever, or that this defendant or any of its officers, directors or members of its Executive Committee (other than the directors F. E. Taplin, C. F. Taplin, and C. K. Reynolds, in respect to whose action this defendant has no knowledge) conspired with each other or among themselves or with any other person, firm or corporation whatsoever. Defendant denies that the members of its Executive Committee acted in the premises in the interest of any person or persons whatsoever, natural or artificial, other than defendant and its stockholders, and avers that said action of said Executive Committee was in the interest and for the advantage of defendant and its stockholders.

26. As to the allegations contained in Section XXXIV of said bill of complaint, it admits that at a meeting of the Board of Directors of this defendant, held on the 11th day of July 1928, there was presented the aforesaid recommendation of the Executive Committee; and that a motion was made and seconded by Old Directors of this defendant, that the recommendation of the Executive Committee be approved and adopted and that the officers of this defendant be authorized to do all things necessary to carry out such recommendation; and alleges that said motion was never put to a vote or voted upon.

27. As to the allegations contained in Section XXXV of said bill of complaint, it denies that plaintiff protested the

action proposed by the aforesaid motion, but admits that said motion was protested by C. F. Taplin on behalf of himself and F. E. Taplin and that without any action having been taken upon said motion, said meeting adjourned to July 20, 1928. It denies that said action to adjourn was taken over the protest of the plaintiff or of other holders of [fol. 105] preferred and common stock of this defendant, and it denies all of the matters and things alleged and set forth in said alleged protests referred to in said Section XXXV.

28. As to the allegations contained in Section XXXVI of said bill of complaint, it admits the allegations concerning the subject matter of the resolutions adopted by said Board of Directors of this defendant at the adjourned meeting of July 20, 1928, but alleges that said resolutions were adopted by a vote of a majority of said Board of Directors composed of all the Old Directors present at said meeting.

29. As to the allegations contained in Sections XXXVII and XXXVIII of said bill of complaint this defendant denies that plaintiff or any other holder of this defendant's stock, other than C. F. Taplin, protested against the resolutions adopted by the directors at said meeting of July 20, 1928, but admits that C. F. Taplin protested against said resolutions. It denies all the matters and things set forth in said alleged protests referred to in said Sections XXXVII and XXXVIII.

This defendant admits that at said meeting of the Board of Directors of July 20, 1928, said resolutions were offered and adopted, but alleges that said resolutions were offered and adopted by Old Directors, and denies that said Old Directors, or any of them, were or are controlled by the B. & O., Central and Nickel Plate, or by any one or more of them.

30. As to the allegations contained in Section XXXIX of said bill of complaint it admits that at a meeting of the directors of this defendant held on November 23, 1928, there was received a report of the defendant's Executive Com- [fol. 106] mittee that the proposed agreements between this defendant and Terminals and between this defendant and Building should not be executed by reason of the fact that certain changes were desirable in the agreement with Ter-

minals, which changes were recommended by the Executive Committee. It alleges that by resolutions adopted by a vote of the Old Directors present at said meeting, constituting a majority of the directors there present, the officers of this defendant were authorized (a) to enter into an agreement with Terminals whereby Terminals would furnish this defendant with passenger station facilities and service in the union depot of Terminals for a period of 100 years upon certain terms and conditions; (b) to enter into an agreement with Erie whereby Erie would furnish this defendant with passenger station facilities and service in the Superior Avenue station of Erie at Cleveland, Ohio, and would permit this defendant to operate over certain tracks of Erie intervening between the main line of this defendant and said Superior Avenue station until such time as Terminals' union depot is completed; (c) to enter into an agreement with Big Four whereby Big Four would give to this defendant permission to operate over certain of its tracks intervening between the main line of this defendant and said Superior Avenue station of Erie until such time as Terminals' union depot is completed; and (d) to enter into an agreement with Terminals whereby Terminals agrees to reimburse and indemnify this defendant for all obligations and liabilities incurred by it under said separate agreements between it and Erie and between it and Big Four, respectively.

Defendant admits that C. F. Taplin, F. E. Taplin and C. K. Reynolds, directors of this defendant, protested said action of this defendant's Board of Directors and voted against the same.

[fol. 107] 31. This defendant admits the allegations of Section XL of said bill of complaint.

32. As to the allegations of Section XLI of said bill of complaint, this defendant admits that it does not desire to abandon and sell its Ontario Street passenger site unless it can be provided with other satisfactory passenger station facilities and service at a cost within its ability to pay; and that so far as this defendant is advised, the facilities and service proposed to be furnished to it by Terminals under the user contract between it and Terminals is preferable from the standpoint of itself and its passengers to

any other facilities and service available to it. It denies that said contract is in substance a lease to this defendant by Terminals of any part of the tracks or other property of Terminals. It admits that the compensation provided for in said contract is as much as this defendant can afford to pay for such facilities and service, but upon information and belief denies that such compensation is less than actual cost to Terminals of furnishing this defendant with said facilities and service. It is without knowledge as to whether or not such compensation is less than the amount that other carriers have agreed to pay for similar service or whether any other carrier or carriers will be provided with similar service and avers upon information and belief that the other carriers which will use said depot will receive a greater and different service than will be accorded this defendant.

It admits that Article III, Section 1, of said contract provides as follows:

"If for any reason the facilities and/or service furnished to the Wheeling Company by the Terminals Company shall be claimed by the Wheeling Company to be unsatisfactory [fol. 108] or inadequate, and the parties are unable to come to an agreement in that regard, the question as to whether the facilities and/or service so furnished are unsatisfactory or inadequate shall be submitted to arbitration as hereinafter provided. In the event the Board of Arbitration shall determine that the facilities and/or service so furnished are unsatisfactory or inadequate, it shall prescribe satisfactory and adequate facilities and/or service, which shall be furnished by the Terminals Company thereafter. Should the Wheeling Company nevertheless consider such facilities and/or service so to be provided to be unsatisfactory or inadequate, it shall have the option to require the Terminals Company, upon sixty (60) days' written notice, to pay to the Wheeling Company as liquidated damages the cost of constructing (exclusive of the cost or value of land) upon the property of the Wheeling Company, at a site to be chosen by the Wheeling Company, a Passenger Station which shall be adequate to the needs of the Wheeling Company (said cost not to exceed $200,000), and upon the completion of said Passenger Station both parties shall be relieved of any further obligations hereunder. In the event of the failure of the parties to agree upon the extent of the

facilities necessary to provide a station adequate to the needs of the Wheeling Company, and/or the cost thereof, such question or questions shall be determined by arbitration as hereinafter provided."
and that Article III, Section 6 of said contract provides as follows:

"This agreement is made subject to all existing and future federal or state laws, and to all rules or orders made by any board, commission or body having competent authority to regulate any of the parties hereto, and to the approval and authorization of the Interstate Commerce Commission (if required by law). In case it should be [fol. 109] found to conflict with any such law, rule or order it shall be modified to conform thereto."

This defendant alleges that said contract was entered into on December 7, 1928.

33. This defendant admits the allegationes of Section XLII of said bill of complaint.

34. This defendant admits the allegations of Section XLIII of said bill of complaint, save that it denies that there has been any determination that the acquisition of this defendant's stock by B. & O., Central, and Nickel Plate, referred to in said section of said bill of complaint, was in violation of Section 7 of the Clayton Act.

35. It admits the allegations contained in the first two paragraphs of Section XLIV of said bill of complaint.

With respect to the allegations concerning the granting of the certificates of convenience and necessity, referred to in said Section XLIV, this defendant alleges that on July 9, 1929, the Commission made and filed a report in said Finance Dockets Nos. 7298 and 7299, containing its findings of fact and conclusions thereon and granted certificates of public convenience and necessity therein, which certificates provided—

"That the present and future public convenience and necessity require the Wheeling & Laka Erie Railway Com pany (1) to operate in passenger and allied services a proposed connecting track and passing siding of the Cleveland Union Terminals Company; (2) to acquire passenger sta-

tion facilities and service in the union depot of the Cleveland Union Terminals Company; and (3) to operate in passenger and allied services temporarily a portion of an [fol. 110] industrial siding track of the Wheeling & Lake Erie Railway Company, tracks and station facilities of the Erie Railroad Company, and tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, all in the city of Cleveland, Cuyahoga County, Ohio, said properties and operations being described in the application in Finance Docket No. 7298 and the report aforesaid.

"That the present and future public convenience and necessity permit the Wheeling & Lake Erie Railway Company to abandon the portion of its line of railroad, including its Ontario Street passenger station, all in the City of Cleveland, Cuyahoga County, Ohio, described in the application in Finance Docket No. 7299 and in the report aforesaid."

and on July 23, 1929, served copies of said certificates upon the statutory agents of this defendant and of plaintiff herein. It denies that a certificate of public convenience and necessity granted by the Interstate Commerce Commission is an order of such Commission within the meaning of the Interstate Commerce Act.

It admits that the Commission attached to such certificates the condition that the same shall take effect and be in force from and after thirty days from the date thereof. It admits that on August 1, 1929, the plaintiff herein filed with the Commission a petition to modify said certificates by changing the effective date thereof to a date not less than thirty days from July 23, 1929, but it denies that such change is required by paragraph 2 of Section 15 of the Interstate Commerce Act or by any other provision of said act or of any other act of Congress. It admits that on August 8, 1929, the Commission amended said certificates by changing the effective date thereof to August 20, 1929.

It admits that on August 3, 1929, the plaintiff filed with the Commission in Finance Dockets Nos. 7298 and 7299, a [fol. 111] petition for rehearing or re-argument and that on August 8, 1929 the Commission denied said petition.

36. It admits the allegations contained in Section XLV of said bill of complaint, save and except that it denies the

allegations therein made that the terms and conditions of the trust agreement of July 30, 1929, are not material to the issues herein and avers they are material.

37. As to the allegations contained in Section XLVI of said bill of complaint it admits that unless enjoined by this Court it will in accordance with the terms of the certificates of necessity in Finance Dockets Nos. 7298 and 7299 abandon its Ontario Street passenger station site and accept temporary passenger station facilities and service at the station of the Erie and make temporary use of the tracks of the Erie and Big Four under the contracts between this defendant and said Erie and Big Four and exercise its option to sell its Ontario Street passenger station site to Building for the consideration of $1,600,000, and upon completion of the union depot of Terminals accept passenger station facilities and service in said union depot under the contract between this defendant and Terminals.

It denies that said consideration of $1,600,000 for the sale of said Ontario Street passenger station site to Building is inadequate.

It denies that its directors, or any of them, are acting under the influence, instruction or control of B. & O., Central and Nickel Plate, or any one or more of them, and it denies that the doing by this defendant of any of the things complained of in said Section XLVI will occasion any loss to the plaintiff as a stockholder of this defendant, or to any other stockholder of this defendant but as defendant be- [fol. 112] lieves will be of benefit and advantage to all of its stockholders and to the public.

38. Answering Section XLVII of said amended bill of complaint this defendant denies that its proposed action, as set forth in said bill, is unlawful or illegal for reason of any of the matters of law in said section pleaded, and further denies that the directors who authorized such action were or are unlawfully holding office for any reason, or that said directors were elected or have acted pursuant to any unlawful conspiracy whatever. This defendant further denies that its proposed action is an attempt to change one of the termini of its railroad or extend its line of railroad beyond its designated termini, or that it pro-

poses to dispose of its Ontario Street passenger site at a price less than the fair and reasonable value thereof, and further denies that the directors of Wheeling who voted in favor of the resolutions referred to were not and are not competent and qualified so to vote for any reason and that the consideration of Twenty Thousand Dollars ($20,000.00) specified in the contract under which Wheeling proposes to use the Union Depot of Terminals is less than the cost to Terminals of rendering the services required by the contract, or that said contract provides for any rebate whatever and denies that unless enjoined by this Court it will be deprived of the best located passenger site in the City of Cleveland, or that it will be burdened with an obligation to pay for passenger station facilities in Cleveland an amount greater than its revenues from its Cleveland passenger business, or equal to or in excess of its gross passenger revenue from all sources.

39. As to the allegations contained in Sections XLVIII, XLIX, L, LI and LII of said bill of complaint, this defendant denies that the certificates of necessity issued by [fol. 113] the Commission in said Finance Dockets Nos. 7298 and 7299, or the report or findings of said Commission therein, are null or void or that the Commission erred in issuing said certificates or in making said report and findings; or that they are illegal or contrary to the evidence, either for the reasons set forth in said Sections XLVIII to LII, inclusive, or for any other reason. This defendant says that said Sections XLVIII to LII, inclusive, contain conclusions of law and arguments in support thereof, which this defendant is advised it is not required to answer herein.

Further answering the allegations contained in said Sections XLVIII to LII, inclusive, that the certificates of convenience and necessity granted by the Commission in Finance Dockets Nos. 7298 and 7299 are unlawful and illegal, null and void, and contrary to the evidence, this defendant says that prior to the making, entering and serving of said certificates and report in said finance dockets, the Commission accorded to the parties to said proceeding, including plaintiff herein, the full hearings provided for in the Interstate Commerce Act: that at said hearings a

large volume of testimony and other evidence bearing upon the matters covered by said report and certificates was submitted to the Commission for consideration on behalf of said parties, including the plaintiff herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties by their respective counsel, whereupon the Commission determined said matters and made, entered and served said report and certificates which include the Commission's decisions, findings, conclusions, certificates and authoriza-
[fol. 114] tions in the premises; that upon the evidence before it and as shown in and by said report and certificates the Commission made the findings and stated the conclusions upon which said certificates are based; that said findings and conclusions were and are, and each of them was and is fully supported and justified by the issues raised and the evidence before the Commission in said proceedings; that in making said report and certificates the Commission considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered by the allegations of the bill of complaint herein; that said certificates were not made or entered by it either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support them; that in making said certificates the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner, and this defendant denies each and all of the allegations to the contrary contained in said bill of complaint. This defendant, therefore, denies that said certificates are unlawful or illegal, or null and void, or contrary to the evidence, for the reasons set forth in said Sections XLVIII to LII or for any other reason.

40. As to the allegations contained in Section LIII of said bill of complaint it alleges that said certificates of public convenience and necessity isued by the Commission in Finance Dockets Nos. 7298 and 7299, as amended, became effective on August 20, 1929, 41 days after the date thereof.

41. Further answering this defendant says that the facts set forth in plaintiff's bill of complaint are insufficient to constitute a valid cause of action in equity.

[fol. 115] Wherefore this defendant prays that the granting of said preliminary injunctions and said permanent injunctions be severally denied and that the bill of complaint be dismissed.

The Wheeling and Lake Erie Railway Company, by W. C. Boyle, Clan Crawford, Charles F. Close, Andrew P. Martin, Its Solicitors. Squires, Sanders & Dempsey, of Counsel.

[fols. 116 & 117] In United States District Court

[Title omitted]

Answer of the Cleveland Union Terminals Company and the Cleveland Terminals Building Company to Amended Bill of Complaint—Filed Sept. 6, 1929.

Now come The Cleveland Union Terminals Company and The Cleveland Terminals Building Company, uniting herein for convenience only and adopting for purposes of brevity designations as used in the amended bill of complaint to indicate various corporations and parties therein and herein referred to, and for their answer to the amended bill of complaint say:

1. As to the allegations of Section I, they deny that the certificates of convenience and necessity issued by the Interstate Commerce Commission were or are arbitrary and without warrant of law and void. They admit that Exhibit "A" is a correct copy of the report and certificates issued by the Commission.

[fol. 118] 2. They admit the allegations of Section II, not intending however to admit, for they deny, that plaintiff was a holder of any Wheeling stock prior to April 8, 1927.

3. As to the allegations of Section III, they admit that Wheeling is an Ohio railroad corporation, having its principal place of business in Cleveland, Ohio, and that it is a resident and citizen of said state, engaged as a common car-

rier in interstate commerce. Upon information and belief they deny that one of its termini is its Ontario Street passenger site in said City, or that the same is specified as such in its Articles of Incorporation, and likewise they allege that said terminus is stated as being in the City of Cleveland, Cuyahoga County, Ohio. They deny that its property described in said Section 3 was on July 3, 1928, or is now of the value of $7,500,000.00 and they allege that Wheeling's property so located, including a leasehold interest adjoining and Wheeling's reversionary interest in land in the streets upon which its said lands abut, was on said date and still is of a value of not in excess of $1,600,000.00.

Not intending to deny that Wheeling's stock is divided into three classes designated as First Preferred, or Prior Lien Stock, Preferred Stock and Common Stock, they have no knowledge or information as to the amounts thereof outstanding or as to the exact rights, preferences, voting powers, restrictions and qualifications of the various classes and they therefore deny the allegations in respect thereof.

Upon information and belief they allege that the rights, preferences, voting powers, restrictions and qualifications [fol. 119] of the several classes of stock of Wheeling are stated and measured by Wheeling's Articles of Incorporation and that such are as set forth in Section 3 of Wheeling's separate answer filed herein.

4. Upon information and belief they admit the truth of the allegations of Sections IV to XI, inclusive.

5. As to the allegations of Section XII, they admit upon information and belief, that Wheeling is now, and for ten years last past has been engaged to some extent in competition with B. & O., Central and Alliance, and to a lesser extent with Nickel Plate and Erie, but deny that it is or has been in competition with Hocking and Chesapeake; but they deny that such competition has been extensive and allege that it has existed largely by reason of participation in through routes with other carriers.

They admit that to some extent the lines of B. & O., Central and Nickel Plate parallel the lines of Wheeling, but allege that Wheeling's lines are to a considerable extent supplementary and complementary to the lines of B. & O.,

Central, Alliance, Nickel Plate and Erie, in forming therewith direct and through routes of trade and commerce.

Upon like information and belief they admit that Wheeling's lines connect with the lines of complainant at Pittsburgh Junction and that the lines of said two form a direct and through route and channel of trade and commerce between Pittsburgh and Toledo, Huron, Lorain and Cleveland, and that to some extent the traffic over such route is competitive with the traffic handled by B. & O., Central, Alliance, Nickel Plate and Erie; and they allege that complainant, [fol. 120] in conjunction with other lines of railway, is in active competition with Wheeling, particularly in respect of the transportation of so-called lake cargo coal to ports on the south shore of Lake Erie as well as the transportation of so-called commercial coal to consuming markets in Ohio and adjoining states, which traffic constitutes a large part of complainant's business.

6. Not admitting, but denying that Van Sweringens are now, or for some time past have been proposing the construction of additional electric railroads or rapid transit lines for the purpose of developing lands and furnishing additional transportation to and from the same and the Public Square in Cleveland, they admit the allegations of Section XIII.

7. As to the allegations of Section XIV, they admit that Van Sweringens caused the Cleveland Union Terminals Company to be organized under the laws of Ohio for the purpose, among other things, of purchasing or leasing depot grounds and locating, constructing and maintaining a common or union station house, passenger or freight depot, or both, and terminal and connecting tracks for the use of steam, or both steam and electric railroads, and for constructing, maintaining and operating in connection with its terminals and station a terminal railroad with two or more tracks connecting the railroads of one or more companies; but they deny that Terminals was incorporated as, or is a railroad company under the laws of Ohio or for the purpose of constructing or operating any railroad line independent of said passenger station and terminal.

They admit that Terminals' authorized capital stock is $10,000.00, divided as alleged, but deny that such is owned

[fol. 121] or controlled by Van Sweringens and that they control the corporations now owning or controlling such stock. They allege that upon completion of Terminals' union station that Company will operate as a union depot company for the handling into, out of and through said station, and over its terminal and connecting tracks, trains and cars of such railroads as may have the right to enter said union depot.

Not intending to deny, for purposes of this action, that Terminals is in some respects and as to some matters subject to the provisions of the so-called Interstate Commerce Act and acts amendatory thereof and supplementary thereto, they do deny that Terminals is or will be engaged in interstate commerce as a common carrier for hire.

Save as herein admitted to be true or specifically denied, they deny the allegations of Section XIV in manner and form as therein set forth.

8. Still denying that Terminals will construct or operate a railroad save as such be necessarily incidental to the construction and operation of its union depot, they admit the allegations of Section XV.

9. They admit the allegations of Section XVI.

10. Not intending to admit that Terminals will construct or operate a line of railroad save as hereinbefore alleged, they admit the allegations of Sections XVII and XVIII.

11. Upon information and belief they admit the allegations of Section XIX, save those that O. P. Van Sweringen does or will dominate or control Terminals and its policies.

[fol. 122] 12. They admit the allegations of Section XX.

13. They admit the allegations of Section XXI, not intending, however, thereby to admit that said parties asked or obtained the right to build or operate a railroad.

14. They admit the allegations of Section XXII and allege that the stipulation therein referred to was in part as follows:

"That in the event any application is made by the Terminals Company, its successors or assigns, or the applicants herein, or any one or more of them for a right to cross or

to fix the mode and manner of crossing the property, tracks, or right of way of the Railway Company at grade or above or below grade at any point north of the Cuyahoga River crossing of the Railway Company, in the City of Cleveland; the entire cost of and physical damages caused by such crossing shall be borne by the Terminals Company, its successors or assigns, or any one or more of the applicants herein who seek such right."

15. They admit the allegations of Section XXIII and allege that the certificate of public convenience issued by the Commission was in the following language:

"That the present and future public convenience and necessity require, and will require, the construction and operation of a terminal station and a line of railroad constituting the approaches thereto, in the City of Cleveland, Ohio, as described in the applications and the report aforesaid."

16. They admit the allegations of Section XXIV.

[fol. 123] 17. They admit the allegations of Section XXV. Further answering said Section they allege that it became necessary to relocate the easterly approach to said union station and the same was duly relocated in conformity to the power so to do reserved in the original contract, and thereafter, in the acquisition by The Cleveland Terminals Building Company of certain real estate for such relocated approach, it developed that the Building Company was unable to acquire certain of such lands at the reasonable value thereof, and because thereof, on or about February 16, 1927, the Building Company and the Terminals Company entered into a contract wherein and whereby they agreed that any parcels of land within said easterly approach which the Building Company should be unable to acquire for a reasonable compensation should, upon request so to do, be appropriated by the Terminals Company through legal proceedings, the Terminals Company to be reimbursed for the amounts of any verdicts or judgments so awarded in such proceedings, as well as for attorneys' fees, costs and expenses incurred in connection with such proceedings.

Pursuant to said contract and because of requests made upon it to do so, Terminals did institute and prosecute to

a conclusion various appropriation proceedings for the purpose of acquiring various parcels of real estate necessary for said easterly approach as relocated, which parcels the Building Company had been unable to purchase at the reasonable value thereof, and because of the valuable and extensive improvements upon certain parcels thereof the Terminals Company paid out in excess of the sum of $— for [fol. 124] such real estate and improvements so appropriated by it, all of which has been repaid to it by the Building Company.

18. As to the allegations of Section XXVI they admit that Terminals constructed the so-called Eagle Avenue ramp, but they deny that this was a voluntary act upon the part of Terminals and they allege that Terminals Company was compelled to do so through the action of the City of Cleveland under an ordinance amendatory of and supplementary to Ordinance No. 47814, and they further allege, upon information and belief, that Wheeling, which had long stood out against and refused to consent to the construction of said ramp transversely over its railroad tracks, was finally threatened and notified by the City of Cleveland that if it did not withdraw such opposition and consent thereto the City of Cleveland would take the appropriate legal action to secure such erection, and because of such threats and compulsion and being fearful that the City would so proceed and would succeed therein, Wheeling likewise consented to the construction of said ramp and thereupon it became, and ever since has been impossible for Terminals and Wheeling to use, jointly or otherwise, Wheeling's Ontario Street passenger station site.

19. Answering the allegations of Section XXVII they admit that at the original hearing before the Commission it was estimated by the parties applying for the certificate that the cost of acquisition of the necessary lands and interests therein for the construction of said union depot of Terminals and its related tracks and approaches, plus the [fol. 125] cost of erecting and constructing the same, would not be in excess of $61,000,000.00, and they further admit that the moneys already expended have greatly exceeded said amount, but they deny that the completed cost will be in excess of $100,000,000.00, and they deny that the cost of

said union depot and terminals when completed will be in excess of any cost required for the public convenience and necessity.

20. Upon information and belief they admit the allegations contained in Section XXVIII, not intending by such admission, however, to admit that such railroad systems are proposed to be under the joint ownership or control of the railroad companies therein mentioned.

21. They have no knowledge or information as to the allegations of Section XXIX and for want thereof they deny the same.

22. Not intending to deny that B. & O., Central and Nickel Plate each became the owner of certain of Wheeling's shares, they deny the allegations of Section XXX and allege that they have no knowledge of any such conspiracy as is alleged or of any other conspiracy or agreement for the accomplishment of the objects therein in said Section set forth.

23. They have no knowledge as to the allegations contained in Section XXXI other than that they are advised that B. & O., Central and Nickel Plate each became the owner of certain shares of Wheeling's stock and they therefore deny the allegations of said Section.

[fol. 126] 24. Taey have no knowledge as to the allegations of Section XXXII and for lack thereof they deny such allegations in manner and form as therein set forth. But they are advised by Wheeling's answer filed herein as to certain matters and they therefore adopt and make a part of this, their answer, the allegations of Section 24 of Wheeling's answer and allege upon information and belief the truthfulness thereof.

25. Answering the allegations contained in Section XXXIII they admit that Wheeling's Executive Committee at a meeting held July 3, 1928, resolved to recommend to Wheeling's Directors that they accept Terminals' offer to furnish Wheeling with passenger station facilities in the union depot when the same should be completed and in the meantime to provide Wheeling with temporary passenger station facilities, provided Terminals and Wheeling could

come to an agreement as to the sale of Wheeling's passenger station site after the same shall have been allowed to be abandoned, and said Executive Committee resolved to recommend to Wheeling's Directors that such be sold to Terminals, or its nominee, for $1,600,000.00; but they deny that such Executive Committee was composed entirely of directors elected by B. & O., Central and Nickel Plate alone, and they deny that the action taken was in furtherance of any agreement or conspiracy whatsoever.

26. As to the allegations contained in Section XXXIV they admit that at a meeting of Wheeling's Directors on July 11, 1928, said recommendation of the Executive Com- [fol. 127] mittee was presented and that a motion was made and seconded that such recommendation be approved and adopted and that Wheeling's officers be authorized to do such things as were necessary to be done to carry the same into effect; but they deny the allegations of said Section in the manner and form as therein set forth.

27. They admit that at said meeting protests of the general tenor and effect as set forth in Section XXXV were made against the action proposed to be taken and that said meeting was adjourned to July 20, 1928; but they allege upon information and belief that such protests were made by C. F. Taplin on behalf of himself and his brother, but they have no knowledge as to whether said brothers were acting for complainant in the matter of making such, and they deny the allegations of Section XXXV save as hereinbefore admitted.

28. They admit that at the adjourned meeting of Wheeling's Directors on July 20, 1928, action was taken substantially as set forth in Section XXXVI, but they deny that such action was authorized only by directors who had been elected by the votes of B & O., Central and Nickel Plate.

29. Answering the allegations of Sections XXXVII and XXXVIII, they admit that protests were made at the meeting of July 20, 1928, substantially as alleged, but they allege that such protests were made by C. F. Taplin, and whether he represented complainant or himself and his brother or others in so doing they do not know. They admit that the resolutions were adopted, but deny that they were adopted

by the votes only of stock of B. & O., Central and Nickel Plate.

[fol. 128] 30. They admit that at a meeting of Wheeling's Directors on November 23, 1928, action was taken and protests against the same were made substantially as set forth in Section XXXIX, denying, however, that the period of user by Wheeling of the union station facilities was limited to twenty-five years.

31. They admit the allegations of Section XL.

32. Answering the allegations of Section XLI, they say that Wheeling has always taken the position that it could not afford to pay more than the sum of $20,000.00 per annum for the use of the services rendered by Terminals for the initial period of such user, based on three thousand trains of not more than fourteen thousand cars. Complainant has so mixed allegations of law and fact in Section XLI that they find it difficult to answer the allegations thereof and therefore they deny the same in manner and form as therein set forth, save as hereinbefore or hereinafter admitted or denied.

Further answering that Section they deny that Terminals' so-called proprietary railroads will pay or be required to pay on a far different basis than Wheeling will be required to pay. They admit Wheeling has the right under said contract on the arising of certain conditions to be relieved from further responsibility thereunder and to withdraw from the union station on the receipt from Terminals of a sum not exceeding $200,000.00, with which Wheeling may construct a passenger station upon a site of its own. They admit that the written agreement between Terminals and Wheeling contains, among other, the language set forth in Section XLI.

[fol. 129] Inasmuch as this contract is one of the foundational contracts involved in this action and will necessarily be before the Court, they do not attempt to set forth herein or to plead any of the terms and conditions thereof, but hereby make tender of the contract in its entirety.

33. They admit the allegations of Section XLII.

34. Answering the allegations of Section XLIII, they admit that on March 11, 1929, the Commission found and determined that B. & O., Central and Nickel Plate should divest themselves of their said ownership of Wheeling's stock within ninety days from said date, but they deny that the Commission determined or found that such ownership was in contravention of the Clayton Act.

35. They admit the allegations of Section XLIV.

36. Upon information and belief they admit the allegations of Section XLV, save that part thereof alleging the non-materiality of the agreement of July 30, 1929.

37. They admit upon information and belief that Wheeling will, unless lawfully enjoined from so doing, exercise its option to require The Cleveland Terminals Building Company to take conveyance of and pay for Wheeling's Ontario Street passenger station site, and that Wheeling will also accept temporary passenger station facilities and service at Erie's station and make use of the tracks of Erie and Big Four under its existing contracts. They deny the allegations of Section XLVI in manner and form as therein set forth and they particularly deny that $1,600,000.00 is an inadequate consideration for said station site and they [fol. 130] allege that said amount is the highest amount which Wheeling after much time and effort could get any competent person in the City of Cleveland to set as such value.

38. They deny the allegations contained in Sub-sections (i), (k) and (l) of Section XLVII. They are advised that the remaining allegations of such Section are argumentative and allegations of legal conclusions and that they are not required to make specific answer thereto; but, if in this respect, they are poorly advised, they deny all of such allegations and they take issue with such allegations of law as are therein set forth.

39. Answering Sections XLVIII, XLIX, L, LI and LII, they deny that the report, findings and orders of the Commission complained of herein are null and void in the respects or for the reasons claimed, and they deny that the

Commission should have made the findings as claimed in said Sections or that the Commission made any erroneous findings of fact or conclusions of law. They are advised that they are not under duty to make specific answer to all things and matters set forth in said Sections for the reason that they are argumentative and contain conclusions of alleged law or mixed law and fact, as to all of which they take issue.

Further answering said Sections, they say that the Commission accorded to all parties to said proceeding before it the full hearings provided for by law; that all parties were accorded the fullest opportunity to introduce evidence in said proceedings and that said opportunity was availed of by the parties; that the Commission gave ample opportunity to the parties and their counsel to argue all ques- [fol. 131] tions which such parties and counsel desired to argue and they likewise availed themselves thereof; that upon all such the Commission acted and exercised the judgment and discretion vested by law in them so to do; that the Commission's findings and conclusions are fully supported and justified by such evidence; that the Commission gave careful consideration to all thereof; that the questions raised before this Court were raised before and argued to the Commission; that the Commission in arriving at its conclusions did not act arbitrarily, unjustly, contrary to evidence or without evidence to support such conclusion and finding reached and made by them,—on account of all whereof these answering defendants say that this Court is without power to amend or set aside the certificates issued by the Commission.

40. They take issue with the conclusion of law set forth in Section LIII.

41. Further answering the Amended Bill of Complaint they say that the same is without equity and insufficient to warrant or require the relief prayed.

[fol. 132] Wherefore The Cleveland Union Terminals Company and The Cleveland Terminals Building Company, having fully answered, pray that the relief prayed

for in the Amended Bill of Complaint be denied and that it be dismissed.

The Cleveland Union Terminals Company and The Cleveland Terminals Building Company, by Charles W. Stage, W. H. Boyd, Homer H. McKeehan, and L. C. Wykoff, Their Solicitors. Charles W. Stage, Boyd, Cannon, Brooks & Wickham, Dustin, McKeehan, Merrick, Arter & Stewart, and George William Cottrell, of Counsel.

Duly sworn to by Charles L. Bradley. Jurat omitted in printing.

[fols. 133 & 134] In United States District Court

[Title omitted]

Separate Answer of Erie Railroad Company to Amended Bill of Complaint—Filed Sept. 6, 1929

To the Honorable Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

Now comes Erie Railroad Company, defendant herein, now and at all times hereafter saving and reserving to itself any and all manner of benefit and advantage of exception to any errors and insufficiencies contained in the Amended Bill of Complaint, and for answer thereto or such parts thereof as it is advised it is material for it to answer, says:

[fol. 135]

I

As to the allegations contained in Section I of said Amended Bill of Complaint, it denies that the orders, decisions and rulings of the Interstate Commerce Commission are arbitrary and without warrant of law or void.

II

This defendant says that it is without knowledge as to the allegations contained in sections II and III of the Amended Bill of Complaint.

III

Upon information and belief, this defendant admits the allegations contained in Sections IV, V, VI, VII, IX and X of the Amended Bill of Complaint.

IV

As to the allegations contained in Section VIII of the Amended Bill of Complaint, defendant admits that it operates a steam railroad in interstate and intrastate commerce in the City of Youngstown, Ohio, and other points in the Cities of Cleveland, Kent and Creston, Ohio, and to other places within and without the State of Ohio.

V

As to the allegations contained in Sections XI to XXVIII inclusive, this defendant says that it is without knowledge as to the matters and things therein set forth.

VI

As to the allegations contained in Section XXIX of the Amended Bill of Complaint, this defendant admits upon information and belief that plaintiff has been proposing an [fol. 136] extension of its line from a point at or near Pittsburgh, Pa., to Connellsville in said state. This defendant says it is without knowledge as to the remaining allegations contained in said section.

VII

As to the allegations contained in Sections XXX to XXXVIII inclusive, this defendant says it is without knowledge with respect thereto.

VIII

As to the allegations contained in Section XXXIX of the Amended Bill of Complaint, this defendant admits upon information and belief that at a meeting of the board of directors of the Wheeling & Lake Erie Railway Company, held November 23, 1928, said board authorized the officers of said Railway Company to enter into the agreement set

forth in said section; and says it is without knowledge as to the other allegations contained therein.

IX

This defendant admits the allegations contained in Section XL of said Amended Bill of Complaint, but as to the allegations contained in Sections XLI to XLVI of said Amended Bill of Complaint, this defendant says it is without knowledge with respect thereto.

X

As to the allegations contained in Sections XLVII to LIII, defendant says it is advised that said sections state conclusions of law and arguments in support thereof, and that it is not required in this Answer to plead to the same.

[fol. 137] Wherefore, having fully answered, this defendant prays that the Amended Bill of Complaint be dismissed at the costs of plaintiff, and for such other and further order as may be appropriate.

Erie Railroad Company, by E. A. Foote, T. H. Burgess, Its Solicitors. Cook, McGowan, Foote, Bushnell & Burgess, Counsel.

[fols. 138 & 139] In United States District Court

[Title omitted]

Separate Answer of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company—Filed Sept. 7, 1929

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

Now comes The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, defendant in the above entitled suit, now and at all times hereinafter saving and reserving to itself any and all manner of benefit and advantage of

exception to the many errors and insufficiencies contained in the Bill of Complaint, for answer thereto or to so much thereof as is material for it to answer, and says:

In this answer defendant adopts and will employ the nomenclature for the various corporations and individuals [fol. 140] used in the bill of complaint as follows: The Baltimore & Ohio Railroad Company is hereinafter referred to as "B. & O."; The New York Central Railroad Company is hereinafter referred to as "Central"; The Lake Erie, Alliance & Wheeling Railroad Company is hereinafter referred to as "Alliance"; The New York, Chicago and St. Louis Railroad Company is hereinafter referred to as "Nickel Plate"; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company is hereinafter referred to as "Big Four"; Erie Railroad Company is hereinafter referred to as "Erie"; The Chesapeake and Ohio Railway Company is hereinafter referred to as "Chesapeake"; The Hocking Valley Railway Company is hereinafter referred to as "Hocking"; The Western Maryland Railway Company is hereinafter referred to as "Maryland"; The Cleveland Union Terminals Company is hereinafter referred to as "Terminals"; The Cleveland Terminals Building Company is hereinafter referred to as "Building"; O. P. and M. J. Van Sweringen are hereinafter referred as to "Van Sweringens."

1. As to the allegations contained in Section I of said Bill of Complaint, it denies that the orders, decisions and rulings of the Interstate Commerce Commission in its Finance Dockets 7298 and 7299 or any thereof, were or are arbitrary, or without warrant of law or void, and, upon information and belief, says that upon the record submitted to the Commission in said Finance Dockets the findings, conclusions and orders of the Commission were and are, and each of them was and is, fully supported and justified; that said rulings, findings and orders were within the authority conferred upon the Commission, and that its authority was exercised in a reasonable manner in accordance with the law.

[fol. 141] 2. Upon information and belief, this defendant admits the allegation of the Section II of said Bill except as to the ownership of stock of The Wheeling & Lake Erie

Railway Company by The Pittsburgh & West Virginia Railway Company, as to which this defendant is without knowledge.

3. Upon information and belief, this defendant admits the allegations of Section III of said Bill, except as to the portion thereof relating to the rights, preferences, voting powers, restrictions and qualifications of the several classes of stock, and except as to the allegations relative to the termini of the Wheeling, as to all of which this defendant is without knowledge.

4. Upon information and belief, this defendant admits the allegations of Sections IV to X inclusive of the Bill.

5. As to the Sections XI to XIII inclusive of the Bill, this defendant says it is without knowledge as to the matters and things therein alleged.

6. As to the allegations contained in Sections XIV to XXVII inclusive of the Bill this defendant admits that on or about August 26, 1918, the parties referred to in the Bill of Complaint as the Van Sweringens caused to be incorported and organized, under the laws of Ohio, The Cleveland Union Terminals Company for the purpose set out in its Articles of Incorporation; that originally all the stock of said company was owned or controlled by the Van Sweringens but that at present said stock is owned 68% by The New York Central Railroad Company, 19% by this answering defendant, 4% by The New York, Chicago & St. Louis Railroad Company, and one share by each of the nine Directors of the Terminals Company; that by Initiated [fol. 142] Ordinance No. 47,814 of the City of Cleveland, Ohio, the Council and citizens of said city approved the construction of a Union Passenger Terminal abutting upon the southwesterly corner of the Public Square in said city with the necessary approaches thereto; and defendant alleges that after approval by the Interstate Commerce Commission in Finance Docket 1237 of the project and the issuance by the Commission of a Certificate that the present and future public convenience and necessity require and will require the construction and operation of a Terminal Station and the approaches thereto in the city of Cleveland, Ohio, as described in the application filed in said Docket,

and the approval by the Commission of the acquisition of control of The Cleveland Union Terminals Company by the New York Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, and this defendant, this defendant and said The New York Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, The Cleveland Union Terminals Company, The Cleveland Terminals Building Company and The Cleveland Traction Terminals Company entered into certain agreements relating to the construction, control and operation of such Union Passenger Terminal, among others being the contracts referred to in Sections XVIII, XIX, XX and XXV of the Bill; this answering defendant alleges, however, that the content and purpose of said agreements are not fully or accurately alleged by the complainant, but that the same are not pleaded herein for the reason they are deemed immaterial and irrelevant to this proceeding; this defendant admits that the plans for the Union Passenger Terminal and the approaches thereto required the use by the Terminals Company of certain rights of way or easements [fol. 143] through the property described in the Bill of Complaint as the Wheeling's Ontario Street Station Site; that the city of Cleveland by ordinance amendatory of and supplementary to Initiated Ordinance No. 47,814 required the Terminals Company to construct what is referred to in the Bill of Complaint as the Eagle Avenue ramp, which has been constructed and which is now in use and known as Scranton Road, S. W., and that it is necessary for the Terminals Company to obtain the right to use certain portions of the Wheeling's Ontario Street Passenger Station site below the grade of Ontario Street in order to construct its Union Passenger Terminal as planned; defendant admits that the Union Passenger Terminal as constructed will cost approximately $100,000,000.00, but denies that the cost thereof is in excess of that required for the public convenience and necessity; this defendant also admits that during the hearing upon Finance Docket 1237 before the Interstate Commerce Commission the Terminals Company, the New York Central, the Nickel Plate and this defendant entered into a stipulation with the Wheeling that in event any application should be made by the Terminals Company, its successors or assigns, for the right to cross or to fix the mode and manner of crossing the property of The

Wheeling & Lake Erie Railway Company at any point north of the Cuyahoga River crossing of the Wheeling in the city of Cleveland, the entire cost of and physical damage caused by such crossing should be borne by the Terminals Company, its successors or assigns, and that after the issuance by the Commission of the Certificate of Public-Convenience and Necessity in said case said stipulation was renewed; and defendant denies the allegations of Sections XIV to XXVII inclusive, except such as have been heretofore admitted or otherwise answered.

[fol. 144] 7. This defendant says it is without knowledge as to the allegations of Sections XXVIII to XXXVIII inclusive of the Bill of Complaint.

8. For answer to Sections XXXIX and XL this defendant admits that under date of December 7, 1928, it entered into an agreement with the Wheeling, duly authorized by the directors of Wheeling and defendant, under which Wheeling is permitted to use certain of the tracks of defendant company in order to reach the passenger station of the Erie Railroad Company in the city of Cleveland, Ohio, and for want of knowledge denies all other averments of said Sections XXXIX and XL.

9. For answer to Section XLI this defendant admits that the contract between the Terminals and the Wheeling provides that upon consideration of the payment by the Wheeling of $20,000.00 per year the Terminals will perform certain services upon not more than 3000 trains containing not more than 14,000 cars of the Wheeling, and that the Wheeling may at any time that it is dissatisfied with the facilities or service furnished by the Terminals, under the conditions set out in said contract, require the Terminals to pay to it a sum not exceeding $200,000.00, to be applied upon the construction of a passenger station upon property of Wheeling, and that upon the completion of such passenger station, Wheeling is to be relieved from further obligations under such contract, and that the contract contains the provision quoted in said Section XLI; and defendant says it is without knowledge as to the other allegations of said Section XLI.

10. For answer to Sections XLII to XLVI inclusive, de-

fendant says it is without knowledge of the allegations therein made.

[fol. 145] 11. For answer to Section XLVII defendant says that it is advised that sub-sections (a) to (j), both inclusive, and sub-section (m) of Section XLVII, state only conclusions of law and arguments in support thereof, and that this defendant is not required in this answer to plead to the same; that it is without knowledge of the allegations contained in sub-sections (k), (l) and (n) of said Section XLVII.

12. For answer to Sections XLVIII to LII inclusive, this defendant, upon information and belief, denies that the report, findings and orders of the Commission in Finance Dockets Nos. 7298 and 7299 are null, void, unlawful or illegal for the reasons therein set out or for any other reasons, but, upon information and belief, says that such report, findings and orders were and are, and each of them was and is, fully supported and justified by the records submitted to the Commission.

13. Further answering, this defendant says that the facts set forth in complainant's Bill of Complaint are insufficient to constitute a valid cause of action in equity.

Wherefore this defendant prays the granting of said preliminary injunction and said permanent injunction be severally denied and that the Bill of Complaint be dismissed.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by H. N. Quigley, C. C. Hand and Wm. King, Its Solicitors

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[fol. 146] In United States District Court

[Title omitted]

Answer of the United States to the Original and the Amended Bills of Complaint—Filed September 7, 1929

United States of America, defendant, for answer to the original and the amended bill of complaint filed herein against it says:

I

United States admits the truth of the allegations contained in paragraphs I to X, inclusive (paragraphs are herein referred to as numbered in the amended bill of complaint) with these exceptions: (a) United States denies the allegation in paragraph I that "said orders, decisions and rulings of the Interstate Commerce Commission (hereinafter called the Commission) were and are arbitrary and without warrant of law and therefore void"; (b) United States says that the allegation in paragraph III that [fol. 147] "Wheeling's Ontario Street Passenger Station Site" as on the 3rd day of July, 1928, "and still is of a value not less than $7,500,00," is irrelevant and immaterial, but denies that such value was proved by the evidence submitted to the Commission.

II

United States, for its answer to the allegations contained in paragraphs XI to XLI, inclusive, admits and alleges that on December 6, 1921, in a proceeding entitled "The Cleveland Pasenger Terminal Case, 70 I. C. C. 659, the Commission issued its report and certificate and order, certifying that the present and future public convenience and necessity require, and will require, the construction and operation of a terminal station and a line of railroad constituting the approaches thereto, in the City of Cleveland, Ohio, as described in the applications therefor and in its report, and authorizing the New York Central Railroad Company, the Cleveland, Cincinnati & St. Louis Railway Company and the New York, Chicago & St. Louis Railroad Company to acquire control by purchase of capital stock, in proportions of 71 per cent, 22 per cent and 7 per cent, respectively, of the Cleveland Union Terminals Company, and by and through control of the last-named Company, to construct and operate a terminal station at the southwest corner of the Public Square in Cleveland, immediately north of the Ontario Street Passenger Station Site of the Wheeling & Lake Erie Railway Company.

United States alleges that, except as so admitted, the al- [fol. 148] legations of said paragraphs XI to XLI, inclusive,

are irrelevant and immaterial, and United States, therefore, neither admits nor denies the truth thereof.

III

United States, for answer to paragraphs XLII to LIII, inclusive, admits and alleges that on December 8, 1929, the Wheeling & Lake Erie Railway Company filed with the Commission an application, designated as Finance Docket No. 7298, under Section 1 (18) to (20) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it (1) to operate in passenger and allied services a proposed connecting track and passing siding aggregating approximately 1,575, feet, of the Cleveland Union Terminals Company (called the Terminals," (b) the acquisition of passenger station facilities and services in the union depot of the Terminals, and (c) the operation, temporarily, of a portion of an industrial siding track of the Wheeling, approximately 612 feet; of tracks of the Erie Railroad Company aggregating approximately 5,363 feet, and station facilities of that Company; and of tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company aggregating approximately 6,744 feet, all in the city of Cleveland, Ohio; that on the same date the Wheeling filed an application with the Commission in Finance Docket No. 7299, under the last-mentioned section and paragraphs of that Act, for a certificate of public convenience and necessity permiting said Wheeling to abandon a portion of its line of railroad, approximately 1,035 feet, including its Ontario Street passenger station in Cleveland; that peti-
[fol. 149] tions of intervention were filed with the Commission in said proceedings by the Pittsburgh & West Virginia Railway Company, plaintiff herein, as a minority stockholder of the Wheeling, and by the Terminals Company; that the proceedings so instituted were entitled "Finance Docket No. 7298, Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company, and Finance Docket No. 7299, Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company, and were heard jointly, the Commission's report and certificates including and em-

bracing its findings, conclusions and certificate in both proceedings.

United States, for further answer to said paragraphs XLII to LIII, inclusive, admits and alleges that the Commission made and entered and served upon the parties to said proceedings its report and certificate mentioned in said paragraphs and annexed as Exhibit A to the bill of complaint; that before making and entering its said report and certificates the Commission accorded the parties, including plaintiff herein, full and complete opportunity to be heard as provided for in the Interstate Commerce Act, and that at the hearings conducted by the Commission in said proceedings a large volume of testimony and other evidence concerning the matters covered by said report and certificates was submitted to the Commission by the parties, including plaintiff herein, by their counsel; that at said hearings questions relating to said maters were fully argued and submitted to the Commission and by it fully considered and determined, whereupon it issued its report and certificates embodying its findings and conclusions upon the evidence [fol. 150] so heard and considered, upon which findings and conclusions said certificates are based.

United States further alleges that the Commission's findings and conclusions are fully supported by the evidence submitted to and considered by it;

That the action of the Commission in making and entering said certificates was not arbitrary, or contrary to the evidence or without support of evidence;

That in making said certificates the Commission did not exceed its authority, or set otherwise unlawfully or unreasonably, and United States denies each and every allegation to the contrary contained in the complaint.

Further answering paragraph XLIV, United States says that on August 8, 1929, the Commission entered an order postponing the effectivedate of said certificates until August 20, 1929; that upon the same date it entered an order denying plaintiff's petition for rehearing or reargument of said proceedings before the Commission.

United States further answering said paragraphs XLVII to LIII, inclusive, denies that said certificates (therein called "the order of the Commission") so made and entered by

the Commission are unlawful and illegal for the reasons in those paragraphs alleged, or for any other reason.

Except as herein expressly admitted United States denies the truth of each and every allegation of the complaint in so far as such allegations conflict either with the allegations herein or with the statements and conclusions of fact included in said report and certificates.

[fol. 151] Wherefore, having fully answered, defendant prays that the complaint be dismissed at the cost of the complainant and for such other and further order as may be appropriate.

Wilfred J. Mahon, United States Attorney. John Lord O'Brian, Assistant to the Attorney General. Elmer B. Collins, Special Assistant to the Attorney General.

Duly sworn to by Elmer B. Collins. Jurat omitted in printing.

[fol. 152] In United States District Court

[Title omitted]

Answer of Interstate Commerce Commission to Amended Bill of Complaint—Filed September 10, 1929

The Interstate Commerce Commission, hereinafter called the Commission, defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the amended bill of complaint, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering subdivision I the Commission denies that the [fol. 153] orders or certificates, decisions and rulings made and issued in its proceeding entitled Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co., Finance Docket 7298, which embraced its pro-

ceeding entitled Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by the Wheeling & Lake Erie Ry. Co., Finance Docket No. 7299, were and are arbitrary and without warrant of law and therefore void. Further answering said subdivision the Commission admits that the document attached to the bill of complaint and marked "Exhibit A" is a true and correct copy of its report and certificates issued in said proceedings.

II

Answering subdivision II the Commission, upon information and belief, admits the truth of the allegations therein contained.

III

Answering subdivision III the Commission admits the truth of the allegations therein contained, except that the Commission denies that the property referred to in paragraph 1 of said subdivision III as "Wheeling's Ontario Street Passenger Station Site" was on the third day of July, 1928, and still is of a value of not less than $7,500,000.

IV

Answering subdivisions IV to X, inclusive, the Commission, upon information and belief, admits that the allega- [fol. 154] tions therein contained are true.

V

Answering subdivisions XI to LIII, inclusive, the Commission admits and alleges that the Cleveland Union Terminals Company, hereinafter called Terminals, is an Ohio corporation, organized and authorized, among other things, to construct and operate a union station and terminal facilities, said station to be located at the southwest corner of the Public Square in Cleveland, Ohio, immediately north of the said Ontario Street Passenger Station Site of the Wheeling & Lake Erie Railway Company, hereinafter called the Wheeling; that, in its proceeding entitled Cleveland Passenger Terminal Case, 70 I. C. C. 659, the Commission issued certificates certifying that it will be in the public

interest for the New York Central Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York, Chicago & St. Louis Railroad Company, hereinafter called the Central, the Big Four and the Nickel Plate, to acquire, respectively, 71 per cent, 22 per cent and 7 per cent of the capital stock of Terminals, and that the present and future public convenience and necessity require and will require the construction and operation by them, through their said control of Terminals, of a union station at the location aforesaid and of a line of railroad constituting the approaches thereto; that, on December 8, 1928, the Wheeling filed with the Commission in the afore- [fol. 155] said Finance Docket No. 7298 an application under section 1 (18) to (20) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it (a) to operate in passenger and allied services, for a period of 100 years, a proposed connecting track and passing siding of Terminals; (b) to acquire, for a period of 100 years, passenger station facilities and service in the new union depot of Terminals; and (c) to operate, temporarily, a portion of an industrial, siding track of the applicant, tracks and station facilities of the Erie Railroad Company and tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company; that on the same date, the Wheeling filed an application in the aforesaid Finance Docket No. 7299 under the same provisions of the Act, for a certificate of public convenience and necessity permitting abandonment by it of a portion of its line of railroad, including its Ontario Street Passenger station, in the city of Cleveland; that petitions of intervention were filed by the Pittsburgh & West Virginia Railway Company, plaintiff in this suit, as a minority stockholder of the Wheeling, and by Terminals; that the proceedings so instituted were entitled Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co., Finance Docket No. 7298, and Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co., Finance [fol. 156] Docket No. 7299; that said proceedings were heard jointly and that the Commission's report and certificates, hereinafter mentioned, embraced and included its report, findings, conclusions and certificates in respect of both said proceedings.

Further answering said subdivisions XI to LIII, inclusive, the Commission admits and alleges that it duly made, entered and served upon the parties to said proceedings its report and certificates referred to in subdivision I of, and shown as Exhibit A to, the bill of complaint; that, prior to the making, entering, and serving of said report and certificates, as aforesaid, it accorded to the parties to said proceeding, including plaintiff herein, the full hearings provided for in the Interstate Commerce Act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said report and certificates was submitted to the Commission for consideration, on behalf of said parties, including the plaintiff herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and make and entered said report and certificates, which included the Commission's decisions, findings, conclusions, certificates and authorizations in the premises; that upon the evidence before it, and as shown in and by said report and certificates, the Commission made [fol. 157] the findings and stated the conclusions upon which said certificates are based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the issues raised and the evidence before the Commission in said proceedings; that, in making said report and certificates, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered by the allegations of the bill of complaint herein; that said certificates were not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said certificates the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary, contained in said bill of complaint.

Further answering the third paragraph of subdivision XLIV, the Commission admits that on August 8, 1929, it entered an order postponing the effective dates of said certificates of public convenience and necessity until August 20, 1929, and that on the same day it entered an order denying the petition of the plaintiff for rehearing or re- [fols. 158 & 159] argument of said proceedings.

Further answering subdivision LIII of the amended bill of complaint, the Commission expressly denies that the certificates issued by the Commission were or are null, void, unlawful or illegal because of the date upon which by their terms they were made effective, or for any other reason.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said amended bill of complaint, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report and certificates of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this honorable court shall direct, and hereby prays that said amended bill of complaint be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Principal Attorney. Daniel W. Knowlton, of Counsel.

Duly sworn to by Frank McManamy. Jurat omitted in printing.

[fols. 160-162] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298

Application of THE WHEELING AND LAKE ERIE RAILWAY COMPANY, under paragraphs 18 to 20, inclusive, of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing it (a) to operate in passenger and allied services, for a period of 100 years, a proposed connecting track and passing siding of the Cleveland Union Terminals Company; (b) to acquire, for a period of 100 years, passenger station facilities and service in the new union depot of the Cleveland Union Terminals Company and (c) to operate, temporarily, a portion of an industrial siding track of the applicant, tracks and station facilities of the Erie Railroad Company and tracks of the Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, all in the city of Cleveland, Ohio

To the Interstate Commerce Commission:

The Wheeling and Lake Erie Railway Company (hereinafter referred to as the "applicant"), pursuant to the provisions of paragraphs 18 to 20, inclusive, of Section 1 of the Interstate Commerce Act applies for authority (if the [fol. 163] authority of the Commision is required therefor)—

(a) to operate in passenger and allied services, for a period of 100 years, a proposed track (and passing siding) of The Cleveland Union Terminals Company, (hereinafter referred to as the "Terminals"), connecting the tracks of the applicant with the tracks entering or appurtenant to the new union depot of the Terminals;

(b) to acquire, for a period of 100 years, passenger station facilities and service in said new union depot of the Terminals, requiring the operation and use of tracks in and appurtenant to said union depot for and on behalf of the applicant;

(c) to operate in passenger and allied services, temporarily (until the Terminals is ready to furnish such passenger station facilities and service in said union depot), a portion of an industrial siding track of the applicant,

tracks and station facilities of the Erie Railroad Company, and tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company;

all in the City of Cleveland, Ohio; and for cause shows:

A. The exact corporate name of the applicant is The Wheeling and Lake Erie Railway Company.

B. It is a common carrier by railroad, subject to the Interstate Commerce Act.

C. It applies for authority—

(1) to operate in passenger and allied services, for a period of 100 years, a proposed track (and passing siding) of the Terminals extending from a point of connection with the main line of the applicant (shown approximately as point "O" on the print hereto attached, marked Exhibit 1, and made a part hereof), to a point of connection with the tracks of the Terminals (shown approximately as point "P" on said Exhibit 1). Said proposed connecting track and passing track are shown in solid green line on said Exhibit 1. The length of said proposed connecting track is approximately 950 feet, and the length of said proposed passing siding is approximately 625 feet. The proposed connecting track and the proposed passing siding will be [fol. 164] constructed under an agreement between the Terminals and the applicant, a copy of which is hereto attached, marked Exhibit 2, and made a part hereof. The proposed tracks will be constructed by the Terminals and will be used jointly by the applicant and the Terminals in the receipt and delivery of trains of the applicant for operation over the tracks of the Terminals in and/or appurtenant to such union depot for and on behalf of the applicant, in accordance with the terms of said agreement marked Exhibit 2.

(2) to acquire, for a period of 100 years, passenger station facilities and service in said union depot of the Terminals pursuant to the terms of the said agreement between the Terminals and the applicant. The acquisition of such passenger station facilities and service will require the operation and use of the tracks in and appurtenant to said union depot for and on behalf of the applicant. Said tracks are shown outlined in solid blue lines on said Exhibit 1.

(3) to operate in passenger and allied services, temporarily (until the Terminals is ready to furnish such passenger station facilities and service in said union depot), the following tracks and station facilities in the City of Cleveland, Ohio:

(a) A portion of an industrial siding track of the applicant extending from a point of connection with the applicant's main line near Mahoning Avenue (shown as point "A" on said Exhibit 1) a distance of 612 feet to a point of connection with an interchange track of the Erie Railroad Company (hereinafter referred to as the "Erie"), shown as point "B" on said Exhibit 1. Said portion of said industrial siding track is shown in solid red line on said Exhibit 1.

(b) Jointly with the Erie, an interchange track of the Erie, extending from the above described point of connection with the industrial siding track of the applicant (shown as point "B" on said Exhibit 1) a distance of 2,093 feet to a point of connection with a connecting track of the Erie (shown as point "C" on said Exhibit 1); a connecting track of the Erie extending from said point of connection with the interchange track (shown as point "C" on said Exhibit 1) a distance of 1,824 feet to a point of connection with the eastward main track of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (hereinafter referred to as the "Big Four"), shown as point "D" on [fol. 165] said Exhibit 1; and two passenger terminal tracks and cross-over of the Erie of the respective lengths of 689 feet, 602 feet and 155 feet (an aggregate of 1,446 feet) extending from a point of connection with a connecting track of the Big Four (shown as point "G" on said Exhibit 1) to another point of connection with said connecting track of the Big Four (shown as point "H" on said Exhibit 1); and the passenger station facilities of the Erie at its Superior Avenue station. All of the tracks of the Erie are shown in solid yellow line on said Exhibit 1.

(c) Jointly with the Big Four and other carriers, the eastward main track of the Big Four extending from a point of connection with the connecting track of the Erie (shown as point "D" on said Exhibit 1) a distance of 4,099

feet to the southerly line of St. Clair Avenue (shown as point "J" on said Exhibit 1); the westward main track of the Big Four extending from a point of connection with a cross-over track leading to said eastward main track (shown as point "M" on said Exhibit 1) a distance of 1,830 feet to a connection with another cross-over track leading to said eastward main track (shown as point "L" on said Exhibit 1); a cross-over track extending from a point of connection with the westerly end of said westward main track (shown as point "M" on said Exhibit 1) a distance of 192 feet to a point of connection with said eastward main track (shown as point "N" on said Exhibit 1); a cross-over track leading from the easterly end of said westward main track (shown as point "L" on said Exhibit 1) a distance of 162 feet to a point of connection with said eastward main track (shown as point "E" on said Exhibit 1); a connecting track extending from a point of connection with the eastward main track of the Big Four (shown as point "F" on said Exhibit 1) a distance of 81 feet to a point of connection with passenger terminal tracks of the Erie (shown as point "G" on said Exhibit 1); and a connecting track extending from a point of connection with the passenger terminal tracks of the Erie (shown as point "H" on said Exhibit 1) a distance of 380 feet to a point of connection with the eastward main track of the Big Four (shown as point "K" on said Exhibit 1). All of the above described tracks of the Big Four are shown in solid brown line on said Exhibit 1.

[fol. 166] For convenient reference the trackage proposed to be operated temporarily by the applicant is described in the following tabulation:

Owning carrier	Description of tracks	Location in Exhibit 1	Length of track (feet)	
The Wheeling and Lake Railway Company.	Industrial Siding.....	A-B	....	612
Erie Railroad Company...	Interchange track.....	B-C	2,093	
	Connecting	C-D	1,824	
	Passenger terminal (3)..	G-H	1,446	
				5,363
The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company.	Eastward main.....	D-J	4,099	
	Westward main.....	M-L	1,830	
	Cross-over	N-M	192	
	Cross-over	L-E	162	
	Connecting	F-G	81	
	Connecting	H-K	380	
				6,744
	Total			12,719

D. The following constitute the reasons why the present and future public convenience and necessity require or will require the proposed operation of said tracks and station facilities and the acquisition of said passenger station facilities and service:

The applicant now owns and operates a passenger terminal in the City of Cleveland, Ohio, located on the southwesterly side of Ontario Street near its intersection with Huron Road. The station building is of wood and stucco construction built in the year 1909 (during the receivership of the property) under a temporary permit granted for one year by the City of Cleveland, Ohio. This building is approaching the end of its structural life, and in the interest of safety of the public and the applicant's employes, in the near future it will be necessary to replace it or to secure passenger station facilities and service elsewhere in the vicinity.

By virtue of the terms of the agreement (Exhibit 2) entered into between the Terminals and the applicant (subject to the approval and authorization of the Interstate Commerce Commission, if required by law), the Terminals has agreed to provide the applicant with passenger station facilities and service in the union depot of the Terminals now under construction at Cleveland, Ohio, for a term of [fol. 167] 25 years, renewable (at the option of the applicant) for a like period, and thereafter renewable (at the option of the applicant) for a further period of 50 years, at certain rentals and upon certain terms and conditions hereinafter more particularly described; and pending the completion of said union depot and/or the beginning of the furnishing of such facilities and service therein to furnish passenger station facilities and service to the applicant at the Superior Avenue station of the Erie in the City of Cleveland, Ohio, free of cost to the applicant.

The compensation to be paid by the applicant for such passenger station facilities and service in the union depot of the Terminals for the first term of 25 years is at the rate of $20,000 per annum for a normal number of 3,000 trains containing in the aggregate not more than 14,000 cars to or from said union depot from points of origin or to points of destination on the present lines of the applicant and moving over the same, or to or from Pittsburgh or Connellsville or points between Pittsburgh or Connells-

ville and the present lines of the applicant on lines constructed, acquired, controlled or operated by the applicant extending from Pittsburgh or Connellsville, or points westerly thereof, to a connection or connections with the present lines of the applicant at Jewett, Ohio, or points southerly or easterly thereof and moving over applicant's lines, such rental to be increased for any year in the proportion by which the number of such trains exceeds 3,000 and/or the number of such cars exceeds 14,000 in said year. The applicant's trains may also include cars from points of origin or to points of destination on extensions of, or on lines connecting with, the present lines of the applicant other than Pittsburgh and Connellsville and points westerly thereof, which cars handled into or through the union depot will be paid for upon the same per car basis from time to time as the cars handled into or through the union depot for the account of the proprietary railroad companies. The rental is to be upon the same basis for the second term of 25 years, subject to an increase to the extent, if any, which may be justified by the increase in operating costs directly attributable to the service rendered by the Terminals for the applicant. For the final renewal period of 50 years, the applicant may acquire the [fol. 168] right of joint use and occupancy of the union depot of the Terminals upon such terms and conditions as may be mutually agreed upon, or in the event of failure to agree, as may be determined by arbitration.

Applicant will be reimbursed by the Terminals for all rentals or other compensation which in the first instance the applicant must pay to the Erie for the right of joint operation of the tracks and station facilities of the Erie, and to the Big Four for the right of joint operation of the Big Four tracks, as provided generally in said Exhibit 2 and specifically in an agreement between the applicant and the Erie, in an agreement between the applicant and the Big Four, and in an additional agreement between the applicant and the Terminals, (all subject to the approval and authorization of the Interstate Commerce Commission, if required by law), copies of which agreements are hereto attached, marked collectively Exhibit 3, and made a part hereof. The Terminals will also bear all the cost and expenses of the construction, rearrangement, maintenance

and removal of tracks and the acquisition of property necessary therefor.

It is estimated by the applicant that the rental of $20,000 per annum to be paid for the passenger station facilities and service to be furnished it in the union depot of the Terminals will be substantially less than the probable cost to the applicant of carrying charges on the lands, and carrying charges, depreciation, maintenance and operation of the buildings, tracks and equipment, necessary to provide the applicant with adequate passenger station facilities in lieu of its present Ontario Street passenger station; and that the acceptance of said facilities and service in said union depot and the acceptance of temporary facilities and service in said Superior Avenue station will be to its best interest and the best interest of the traveling public which it serves, and will enable the applicant to render to the traveling public a more efficient service than it can render in its present Ontario Street passenger station or in any station which it might, at a reasonable cost, build in substitution therefor.

If the authority herein sought is granted, the applicant proposes, subject to the approval of the Interstate Commerce Commission and of the Public Utilities Commission of Ohio, to abandon for common carrier service its Ontario [fol. 169] Street passenger station and the portion of its railroad lying northerly of the northerly line of Eagle Avenue in the City of Cleveland, Ohio. (See application for authority for such abandonment filed or to be filed with the Interstate Commerce Commission.)

Applicant has secured an option from The Cleveland Terminals Building Company giving to the applicant the right for a period of five years to require the Building Company upon ten days' notice to pay to the applicant the sum of $1,600,000 in consideration for the conveyance by the applicant to the Builidng Company of the lands owned by the applicant situate northerly of Eagle Avenue in the City of Cleveland, Ohio, (with all reversionary rights incident thereto), and for the assignment by the application to the Building Company of a leasehold interest in certain adjoining alnds; which sum is not less than the reasonable market value of said lands, reversionary rights and leasehold interest.

E. The applicant has no traffic relationships with any other operating or non-operating railroad corporation, or corporations (other than its subsidiaries) except such as are customary among connecting carriers for the transportation of interline or overhead freight.

The only financial relationships which the applicant has with any other operating or non-operating railroad corporation, or corporations, are as follows:

It owns or controls all of the outstanding securities of its subsidiaries: The Lorain & West Virginia Railway Company, The Toledo Belt Railway Company, The Zanesville Belt & Terminal Railway Company, and The Sugar Creek & Northern Railroad Company.

The following railroad corporations own stock of the applicant in varying amounts:

The Baltimore and Ohio Railroad Company

The New York Central Raliroad Company

The New York, Chicago and St. Louis Railroad Company

The Pittsburgh & West Virginia Railway Company

Wabash Railway Company

[fol. 170] F. Correspondence in regard to this application should be addressed to Squire, Sanders & Dempsey, General Counsel of the applicant, 1857 Union Trust Building, Cleveland, Ohio.

G. The applicant was incorporated December 14, 1916, under the laws of the State of Ohio, and was organized under the laws of that state. It operates lines of railroad in the State of Ohio by virtue of the terms of its charter.

H. The Vice President and General Manager of the applicant was authorized to make and file this application by resolutions of the Board of Directors of the applicant, adopted at meetings held in the City of Cleveland, Ohio, on July 20, 1928 and in the City of New York on November 23, 1928.

I. The tracks and station facilities proposed to be operated are located entirely within the city limits of the City of Cleveland, Cuyahoga County, Ohio.

J. The route and termini of the tracks and station facilities proposed to be operated by the applicant, or on its

behalf, as provided in the contract marked Exhibit 2, are as follows:

1. For a term of 100 years, a connecting track (with a passing siding) of the Terminals extending from a point of connection with the main line of the applicant (shown approximately as point "O" on said Exhibit 1, to a point of conection with the terminal tracks of the Terminals (shown approximately as point "P" on said Exhibit 1); and thence over said terminal tracks into the union depot of the Terminals.

2. Pending the completion of the union depot of the Terminals and/or the beginning of the furnishing of facilities and service therein, tracks beginning at a point of connection between the main line of the applicant and an industrial siding track of the applicant near Mahoning Avenue in the City of Cleveland (shown as point "A" on said Exhibit 1); thence for a distance of 612 feet over said industrial siding track to a point of connection with an interchange track of the Erie (shown as point "B" on said Exhibit 1); thence a distance of 2093 feet over said interchange track of the Erie to a point of connection with a connecting track of the Erie (shown as point "C" on said Ex- [fol. 171] hibit 1; thence a distance of 1824 feet over said connecting track of the Erie to a point of connection with the eastward main track of the Big Four (shown as point "D" on said Exhibit 1); thence a distance of 4099 feet over said eastward main track to the southerly line of St. Clair Avenue (shown as point "J" on said Exhibit 1), together with the following additional tracks intervening between points "A" and "J": two pasenger terminal tracks and a cross-over of the Erie, aggregating 1446 feet in length, extending between points "G" and "H", as shown on said Exhibit 1; a connecting track of the Big Four of the length of 81 feet extending between points "F" and "G", as shown on said Exhibit 1; a connecting track of the Big Four of the length of 380 feet extending between points "H" and "K", as shown on said Exhibit 1; and (for westbound movement) a westward main track of the Big Four with two cross-over tracks, aggregating 2184 feet in length, extending from point "E" to point "N", as shown on said Exhibit 1.

K. Applicant desires a hearing upon this application.

L. Exhibit 1 hereto attached is a map drawn to scale (1 inch equals about 385 feet) indicating the location of tracks and station facilities proposed to be operated by or on behalf of the applicant, showing fully their geographical situation and relation to existing railroad lines and other geographical facts pertinent to a consideration of the case.

Accompanying the application but not attached hereto is a tracing of said Exhibit 1 on tracing linen.

Wherefore applicant prays that if the authority of the Commission is required therefor it may be authorized to operate the tracks and station facilities and to acquire the passenger station facilities and service hereinbefore described for the respective periods hereinbefore set forth.

The Wheeling and Lake Erie Railway Company.
(Signed) Geo. Durham, Vice President and General Manager.

[fols. 172 & 173] STATE OF OHIO,
County of Cuyahoga, ss:

George Durham makes oath and says that he is the Vice President and General Manager of The Wheeling and Lake Erie Railway Company; that he has examined each and all of the statements made in the foregoing application; that they are true and correct to the best of his knowledge and belief; that he declares and believes that the granting of authority as prayed for in the foregoing application is necessary to enable the applicant properly to meet the transportation needs of the public and more efficiently to operate its railroad; that the foregoing application is verified and filed at the direction of the Board of Directors of the applicant contained in resolutions of said Board of Directors, adopted at meetings duly held at Cleveland, Ohio, on the 20th day of July, 1928 and in the City of New York on the 23rd day of November, 1928; and that he has been authorized by said Board of Directors to execute any and all papers and to do any and all things which may be required in connection with the foregoing application.

(Signed) By Geo. Durham.

Sworn to and subscribed before me, a Notary Public in and for said state and county, this 7th day of December, 1928. (Signed) John A. McCort, Notary Public. My commission expires July 28, 1930. (Seal.)

Exhibit No. 1 to foregoing application omitted in printing as it is the same as original exhibit No. 31 on file with the Clerk.

[fol. 174] EXHIBIT 2 TO APPLICATION OF WHEELING CO.

Agreement by and Between The Cleveland Union Terminals Company and The Wheeling and Lake Erie Railway Company

[fol. 175] Agreement made the 27th day of November, 1928, by and between The Cleveland Union Terminals Company, a corporation of the State of Ohio, hereinafter referred to as the Terminals Company, and The Wheeling and Lake Erie Railway Company, a like corporation, hereinafter referred to as the Wheeling Company:

Whereas, the Wheeling Company owns and operates a line of railroad extending into the City of Cleveland, Ohio, and terminating at or near its present Ontario Street Passenger Station, near the intersection of Ontario Street and Huron Road, in said City of Cleveland, Ohio; and

Whereas, in the opinion of the Management of the Wheeling Company said Ontario Street Passenger Station in the near future will become unsuitable and unsafe for use by the Wheeling Company as a passenger station, necessitating the rebuilding thereof, or the substitution therefor of other passenger station facilities in the vicinity thereof; and

Whereas, the Terminals Company is engaged in the construction of a Union Passenger Depot in the City of Cleveland, Ohio, at the southwest corner of the Public Square, immediately to the north of the Ontario Street Passenger Station of the Wheeling Company, which Union Passenger Depot, with its tracks and appurtenances, is hereinafter referred to as the "Passenger Terminal"; and

Whereas, the Terminals Company is willing to furnish to the Wheeling Company, for the consideration hereinafter named, for a period of twenty-five (25) years from the date of completion of said Passenger Terminal (renewable for a like period) passenger station facilities and service in said Passenger Terminal, and in the interval between the date of the vacation by the Wheeling Company of its Ontario Street Passenger Station, for the reasons above stated, and the date of completion of said Passenger Terminal, to furnish to the Wheeling Company, at the sole cost and expense of the Terminals Company, such passenger station facilities and service as may be acceptable to the Wheeling Company; and

[fol. 176] Whereas, it is to the interest of the traveling public served by the Wheeling Company that it should have the advantage of the facilities offered by the Terminals Company in the Passenger Terminal, and particularly the advantage incident to direct connection with trunk lines entering such Passenger Terminal,

Now, Therefore, for and in consideration of the covenants, promises and obligations of the parties herein contained it is agreed by and between them as follows:

Article I

Terminal Facilities and Service to be Furnished by the Terminals Company

Section 1. For and in consideration of the rental hereinafter provided to be paid by the Wheeling Company to the Terminals Company, the Terminals Company agrees to furnish to the Wheeling Company in the Passenger Terminal for a period of twenty-five (25) years (renewable for a like period) as hereinafter provided, in conjunction with such other railroad companies to which rights of user may be granted by the Terminals Company, all of the passenger facilities and service (other than coach yard) usually furnished at passenger stations, which shall include, inter alia, the following:

(a) The handling, by the Terminals Company's locomotives and locomotive crews, with reasonable promptness and dispatch, of all of its trains between the point of con-

nection of the tracks of the Wheeling Company with the tracks of the Terminals Company (the general location whereof is shown as point "A" on the blue print hereto attached marked Exhibit "A" and made a part hereof), and the station in the Passenger Terminal, including the placing of United States Mail Cars for the loading of outbound mail in advance of the departure of trains as required by the Post Office Department, and the heating, when necessary, of trains after arrival and prior to departure from station.

(b) The furnishing of information, by clerks, bulletin boards, notices and otherwise, as to the arrival and departure of the Wheeling Company's trains.

(c) The sale and accounting for all passenger tickets.

[fol. 177] (d) The receiving, checking and delivering of baggage, and the sale of and accounting for excess baggage checks.

(e) The receiving and dispatching of United States mail, railroad mail and newspapers, company materials and supplies, handled in baggage service to and from trains of the Wheeling Company.

(f) The receipt and delivery of milk in baggage cars on inbound passenger trains in the manner now handled by the Wheeling Company, and the loading of empty milk cans for return movement.

(g) The furnishing of ample space for the receipt, delivery, and storage of express shipments via the lines of the Wheeling Company.

(h) Access to the following:

Public telephone and telegraph, public toilets, parcel checking, lavatories and waiting rooms for men and women; facilities for the operation of taxicabs, transfer busses, and transfer baggage trucks; facilities for stocking diners, and business cars during the period that the same facilities are provided for the proprietary or user companies; and reasonable locker space for conductors and trainmen.

The Terminals Company at its sole cost and expense shall, as a part of the Passenger Terminal construct and

maintain a connecting track (together with a run around track) between its tracks and the tracks of the Wheeling Company—substantially as shown in solid red lines on said Exhibit "A," or at such other location in that vicinity as will effect such connection—and shall make such changes in its tracks and structures and in the tracks and structures of the Wheeling Company and/or make such arrangements with other railroad companies as will enable it to render passenger facilities and service to the Wheeling Company as herein provided.

Section 2. The Wheeling Company shall accept such facilities and service upon the terms and conditions herein provided and shall pay to the Terminals Company, at the office of the Treasurer of the Terminals Company, in full consideration of all the facilities and service to be furnished to the Wheeling Company by the Terminals Company, from [fol. 178] and after the date of completion of said Passenger Terminal, and/or the beginning of the furnishing by the Terminals Company to the Wheeling Company of complete passenger facilities and service therein, for each and every year of the term of this agreement, or any renewal thereof, in equal monthly installments, in advance, an annual rental of Twenty Thousand Dollars ($20,000.00) for a total of not more than 3,000 trains containing in the aggregate not more than 14,000 cars to or from the Passenger Terminal from points of origin or to points of destination on the present lines of the Wheeling Company and moving over the same, or to or from Pittsburgh or Connellsville or points between Pittsburgh or Connellsville and the present lines of the Wheeling Company, on lines constructed, acquired, controlled or operated by the Wheeling Company extending from Pittsburgh or Connellsville, or points westerly thereof, to a connection or connections with the present lines of the Wheeling Company at Jewett, Ohio, or points southerly or easterly thereof and moving over said Wheeling Company's lines, such rental to be increased for any year in the proportion by which the number of such trains exceeds 3,000 and/or the number of such cars exceeds 14,000 in said year. A car or train moved in loaded and out empty, or moved in empty and out loaded, shall be counted as one car or one train, respectively.

The Wheeling Company's trains may also include cars from points of origin or to points of destination on extensions of or on lines connecting with the present lines of the Wheeling Company other than Pittsburgh and Connellsville and points westerly thereof as aforesaid, which cars handled into or through the Passenger Terminal shall be paid for upon the same per car basis from time to time as the cars handled into or through the Passenger Terminal for the account of the proprietary railroad companies of the Passenger Terminal.

All of said payments to be made by the Wheeling Company to the Terminals Company shall be paid in lawful gold coin of the United States of America of the present standard of weight and fineness, or its equivalent, and any payment accruing under the provisions of this agreement which shall not be paid when due shall bear interest at the rate of six [fol. 179] per cent (6%) per annum, from the day when the same should be paid.

Section 3. During the period intervening between the date of the vacation by the Wheeling Company of its Ontario Street Passenger Station and the date of completion of said Passenger Terminal and/or beginning of the furnishing to the Wheeling Company of passenger facilities and service therein, the Terminals Company shall furnish to the Wheeling Company passenger facilities and service (including inter alia the items of service described in detail in Section 1 of this Article I) at a station acceptable to the Wheeling Company, and shall secure to the Wheeling Company the right to operate over the tracks of any other railroad or railroads to enable it to reach such passenger station.

All of the costs and expenses of the furnishing of such temporary passenger facilities and service, the construction, rearrangement, maintenance and removal of tracks and the acquisition of property necessary therefor, and the charges made by said other railroad or railroads for the right to operate over their tracks shall be assumed and borne solely by the Terminals Company.

The parties agree that such temporary passenger facilities and service may be furnished in the Superior Avenue station of the Erie Railroad Company; and the Terminals Company shall secure for the Wheeling Company the right to operate over the tracks of the Erie Railroad Company

and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company between said Superior Avenue station and a point of connection between the tracks of the Erie Railroad Company and of the Wheeling Company in, or near, Mahoning Avenue in the City of Cleveland, Ohio. The obligations of the Terminals Company, the Erie Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company shall be incorporated in an agreement or agreements among said companies and the Wheeling Company, a copy or copies whereof, after execution by the parties thereto, shall be attached to this agreement, marked Exhibit "B," and made a part hereof.

[fol. 180] Section 4. Provided that said proposed agreement or agreements above referred to as Exhibit "B" shall have been executed (and approved by the Interstate Commerce Commission, or any other regulatory body, if required by law) and the necessary construction and/or rearrangement of tracks has been completed, and provided the authority of the Interstate Commerce Commission and/or the Public Utilities Commission of Ohio (if required by law) shall have been obtained therefor, the Wheeling Company shall upon ten (10) days' written notice from the Terminals Company, vacate the Wheeling Company's present Ontario Street Passenger Station and shall accept temporary passenger facilities and service proposed to be furnished to it by the Terminals Company at said Superior Avenue station of the Erie Railroad Company.

Article II

Loss and Indemnity

The Terminals Company shall at all times protect, indemnify, save harmless and defend the Wheeling Company from any and all claims, demands, causes of action, costs or expense on account of the death of or injury to any and all persons whomsoever, and loss of or damage to the property of the Wheeling Company, or of the Terminals Company, or of third parties, which the Wheeling Company may suffer, sustain or be subject to, directly or indirectly, either wholly or in part caused by or arising out of, or in any way connected with the furnishing of any of said passenger

facilities and service by the Terminals Company to the Wheeling Company, unless caused by the sole negligence of the Wheeling Company, its officers or employes.

Article III

Miscellaneous

Section 1. If for any reason the facilities and/or service furnished to the Wheeling Company by the Terminals Company shall be claimed by the Wheeling Company to be unsatisfactory or inadequate, and the parties are unable to come to an agreement in that regard, the question as to [fol. 181] whether the facilities and/or service so furnished are unsatisfactory or inadequate shall be submitted to arbitration as hereinafter provided. In the event the Board of Arbitration shall determine that the facilities and/or service so furnished are unsatisfactory or inadequate, it shall prescribe satisfactory and adequate facilities and/or service, which shall be furnished by the Terminals Company thereafter. Should the Wheeling Company nevertheless consider such facilities and/or service so to be provided to be unsatisfactory or inadequate, it shall have the option to require the Terminals Company, upon sixty (60) days' written notice, to pay to the Wheeling Company as liquidated damages the cost of constructing (exclusive of the cost or value of land) upon the property of the Wheeling Company, at a site to be chosen by the Wheeling Company, a Passenger Station which shall be adequate to the needs of the Wheeling Company (said cost not to exceed $200,000), and upon the completion of said Passenger Station both parties shall be relieved of any further obligations hereunder. In the event of the failure of the parties to agree upon the extent of the facilities necessary to provide a station adequate to the needs of the Wheeling Company, and/or the cost thereof, such question or questions shall be determined by arbitration as hereinafter provided.

Section 2. This agreement shall continue for the term of twenty-five (25) years from the date of the beginning of the furnishing of such facilities and service in said Passenger Terminal of the Terminals Company subject to the right of

the Wheeling Company to renew the same upon notice in writing given six (6) months prior to the expiration thereof for another period of twenty-five (25) years upon the same terms and conditions and upon the same rental, provided, however, that for said renewal period the rental shall be increased to the extent, if any, which may be justified by the increase in operating costs directly attributable to the service rendered by the Terminals Company for the Wheeling Company, such increase to be determined by comparing the average cost of furnishing the service during the first five year period of said original term of twenty-five (25) years with the average cost of furnishing such service during the last five year period thereof.

[fol. 182] In the event the parties are unable to agree as to the amount of the rental for the renewal period of twenty-five (25) years, then the matter shall be submitted to arbitration as provided for herein; provided, however, that the Wheeling Company shall have the option within a period of three (3) months following the receipt of the decision of said arbitrators as to the rental for said renewal period to terminate this agreement by written notice to the Terminals Company, effective three (3) months after date of such notice, the rental to be paid between the end of the first twenty-five (25) year period and the effective date of the termination of said agreement to be upon the same basis as for the original term of twenty-five (25) years.

If said agreement is renewed for the period of twenty-five (25) years, the Wheeling Company shall have the option upon written notice to the Terminals Company, given not less than one (1) year prior to the termination of said renewal period, to acquire the right of joint use and occupancy of said passenger terminal for a further period of fifty (50) years from the date of the expiration of said renewal period upon such terms and conditions as may be mutually agreed upon or in the event of the failure of the parties to agree upon such terms and conditions, the same shall be determined by arbitration; the Wheeling Company reserving the right to not avail itself of such option if the award is unsatisfactory to it. In the event said matter is submitted to arbitration, the rights of the parties shall remain in status quo without prejudice to the rights of either; provided that

the Wheeling Company shall pay the current rental and retroactively such additional amount as may be awarded for rental by the arbitrators for such user period.

Section 3. In the event it becomes necessary to submit to arbitration any of the matters as to which arbitration is provided for in this agreement, the same shall be submitted to a board of arbitrators composed of three members to be selected as follows:

The party desiring the arbitration shall select one arbitrator and in writing notify the other party of such selection and of the matter to be arbitrated. Whereupon the other party shall within ten (10) days after the receipt of [fol. 183] such written notice select a second arbitrator notifying the other party in writing of such selection. The two arbitrators so chosen shall within ten (10) days thereafter choose a third arbitrator. In the event such party fails to select an arbitrator within such period the arbitrator first selected shall choose a second arbitrator and the two so selected shall choose a third, provided that in the event the two arbitrators so chosen by the parties in either of said ways shall fail to agree upon the third arbitrator, he shall be appointed by the Senior Judge of the United States District Court for the Northern District of Ohio, Eastern Division. The expense of said arbitration, including the fees of the arbitrators, shall be equally divided between the parties hereto. The award or findings of said arbitrators or a majority thereof shall be final and binding upon the parties hereto, subject, however, to the options which may be exercised by the Wheeling Company following such arbitration as hereinabove provided for.

Section 4. During the original term of twenty-five (25) years and the renewal period of twenty-five (25) years, this contract shall be terminable at the end of any five (5) year period on not less than one (1) year's notice in writing given by the Wheeling Company to the Terminals Company.

Section 5. All the covenants, agreements, conditions and understandings herein contained shall extend to and be binding upon and inure to the benefit of the successors and

assigns of the parties hereto, subject, however, to the provisions of Section 2 of Article I hereof.

Section 6. This agreement is made subject to all existing and future federal or state laws, and to all rules or orders made by any board, commission or body having competent authority to regulate any of the parties hereto, and to the approval and authorization of the Interstate Commerce Commission (if required by law). In case it should be found to conflict with any such law, rule or order it shall be modified to conform thereto.

[fol. 184] In Witness Whereof, the parties hereto have caused these presents to be signed by their respective proper officers, and their corporate seals to be hereunto attached and duly attested as of the day first above written.

The Cleveland Union Terminals Company, by (Signed) C. L. Bradley, President. Attest: (Signed) Charles W. Stage, Secretary. (Corporate Seal.) The Wheeling and Lake Erie Railway Company, by (Signed) W. M. Duncan, Chairman of the Board. Attest: (Signed) C. E. Bahl, Secretary. (Corporate Seal.)

Signed, sealed and acknowledged in the presence of: (Signed) F. L. Jouannet, (Signed) L. W. Stressing, as to the Cleveland Union Terminals Company. (Signed) J. A. McCort, (Signed) J. L. Fenton, as to the Wheeling and Lake Erie Railway Company.

[fol. 185] State of Ohio,
Cuyahoga County, ss:

Personally appeared before me the undersigned, a Notary Public in and for said County and State, C. L. Bradley and Charles W. Stage to me known and known to me to be the President and the Secretary, respectively, of The Cleveland Union Terminals Company, one of the corporations which executed the foregoing instrument, who severally acknowledged to me that they did sign and seal said instrument as such President and Secretary, respectively, for and on behalf of said corporation and that the same is their free act and deed as such officers and the free and corporate act and deed of said The Cleveland Union Terminals Company.

In witness whereof, I have hereunto set my hand and official seal this 27th day of November, 1928.

(Signed) John Connell, Notary Public. (Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

Personally appeared before me the undersigned, a Notary Public in and for said County and State, W. M. Duncan and C. E. Bahl to me known and known to me to be the Chairman of the Board and the Secretary, respectively, of The Wheeling and Lake Erie Railway Company, one of the corporations which executed the foregoing instrument, who severally acknowledged to me that they did sign and seal said instrument as such Chairman of the Board and Secretary, respectively, for and on behalf of said corporation and that the same is their free act and deed as such officers and the free and corporate act and deed of said The Wheeling and Lake Erie Railway Company.

In witness whereof I have hereunto set my hand and official seal this 7th day of December, 1928.

(Signed) John A. McCort, Notary Public. (Seal.)

[fol. 186] The New York Central Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and The New York, Chicago and St. Louis Railroad Company, as stockholders of the Terminals Company, hereby approve the execution of the foregoing agreement with the Wheeling Company and the terms thereof as set forth in said agreement.

The New York Central Railroad Company, by (Signed) P. E. Crowley, President.

Attest: (Signed) E. F. Stephenson, Secretary. (Corporate Seal.)

Signed, sealed and acknowledged in the presence of: (Signed) Helen Augur, (Signed) J. W. Dwyer, as to the New York Central Railroad Company.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, by (Signed) P. E. Crowley, President.

Attest: (Signed) E. F. Stephenson, Secretary. (Corporate Seal.)

Signed, sealed and acknowledged in the presence of: (Signed) Helen Augur, (Signed) J. W. Dwyer, as to the Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

The New York, Chicago and St. Louis Railroad Company, by (Signed) W. L. Ross, President.

Attest: (Signed) C. C. Collister, Asst. Secretary. (Corporate Seal.)

Signed, sealed and acknowledged in the presence of: (Signed) J. H. Agate, (Signed) M. M. Gilmore, as to the New York, Chicago and St. Louis Railroad Company.

[fol. 187] State of New York,
County of New York, ss:

Personally appeared before me the undersigned, a Notary Public, in and for said County and State, P. E. Crowley and E. F. Stephenson to me known and known to me to be the President and the Secretary, respectively, of The New York Central Railroad Company, one of the corporations which executed the foregoing approval of the agreement between The Cleveland Union Terminals Company and The Wheeling and Lake Erie Railway Company, who severally acknowledged to me that they did sign and seal said approval as such President and Secretary, respectively, for and on behalf of said The New York Central Railroad Company, and that the same is their free act and deed as such officers and the free and corporate act and deed of said The New York Central Railroad Company.

In witness whereof I have hereunto set my hand and official seal this 1 day of Dec., 1928.

(Signed) J. M. O'Mahoney, Notary Public. Notary Public, Bronx County. Clerk's No. 17, Register's No. 3020. Certificate filed in New York County. Clerk's No. 130, Register's No. 0-91. My commission expires March 30, 1930. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me the undersigned, a Notary Public, in and for said County and State, P. E. Crowley and E. F. Stephenson to me known and known to me to be the President and the Secretary, respectively, of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, one of the corporations which executed the foregoing approval of the agreement between The Cleveland Union Terminals Company and The Wheeling and Lake Erie Railway Company, who severally acknowledged to me that they did sign and seal said approval as such President and Secretary, respectively, for and on behalf of said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and that the same is their free act and deed as such officers and the free and corporate act and deed of said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. [fols. 188 & 189] In witness whereof, I have hereunto set my hand and official seal this 1 day of Dec., 1928.

(Signed) J. M. O'Mahoney, Notary Public. Notary Public, Bronx County. Clerk's No. 17, Register's No. 3020. Certificate filed in New York County. Clerk's No. 130, Register's No. 0-91. My commission expires March 30, 1930. (Seal.)

STATE OF OHIO,
County of Cuyahoga, ss:

Personally appeared before me the undersigned, a Notary Public, in and for said County and State, W. L. Ross and C. C. Collister to me known and known to me to be the President and the Assistant Secretary, respectively, of The New York, Chicago and St. Louis Railroad Company, one of the corporations which executed the foregoing approval of the agreement between The Cleveland Union Terminals Company and The Wheeling and Lake Erie Railway Company, who severally acknowledged to me that they did sign and seal said approval as such President and Assistant Secretary, respectively, for and on behalf of said The New York, Chicago and St. Louis Railroad Company and that the same is their free act and deed as such officers and the free and

corporate act and deed of said The New York, Chicago and St. Louis Railroad Company.

In witness whereof, I have hereunto set my hand and official seal this 7th day of December, 1928.

(Signed) Wm. A. Brisky, Notary Public. (Seal.)

[fol. 190] EXHIBIT 3 TO APPLICATION OF WHEELING CO.

Part 1

This agreement made and entered into in duplicate this 5th day of December, 1928, by and between the Erie Railroad Company, a corporation, lessee of the railroad and property of The Nypano Railroad Company, (hereinafter referred to as the "Erie") as first party, and The Wheeling and Lake Erie Railway Company, a corporation of the State of Ohio, (hereinafter referred to as the "Wheeling") as second party, Witnesseth:

Whereas, upon the completion of the Union Depot of The Cleveland Union Terminals Company in the City of Cleveland, Ohio, the Wheeling expects to be furnished passenger station facilities and service therein by said Terminals Company in lieu of the Ontario Street passenger station of the Wheeling in the City of Cleveland, and

Whereas, pending the completion of said Union Depot the Wheeling desires that the Erie will furnish to the Wheeling passenger station facilities and service in the Superior Avenue station of the Erie and that the Erie will give to the Wheeling the right to operate its passenger trains over the Erie's tracks at said Superior Avenue passenger station and intervening tracks owned or leased by the Erie between said station and the tracks of the Wheeling, and the Wheeling has entered into an agreement with The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company wherein the latter has given to the Wheeling Company the right to use its tracks intervening between certain Wheeling tracks and certain Erie tracks:

Now, Therefore, in consideration of the covenants and agreements of the parties hereto and the payment to be made by the Wheeling as hereinafter provided it is mutually agreed as follows:

Article I

The Erie hereby gives to the Wheeling, for its passenger trains and passenger train switching locomotives only, the right to use in either direction, jointly with the Erie, cer- [fol. 191] tain tracks and appurtenant facilities of the Erie within the City of Cleveland, Cuyahoga County, Ohio, said tracks being as follows:

The portion of an interchange track, from a point of connection with an industrial siding track of the Wheeling (shown as point "B" on the print hereto attached and made a part hereof, entitled Exhibit A. Erie Railroad Company, Mahoning Division. Plan showing Erie tracks to be used by W. & L. E. Ry. in the operation of their passenger trains from a point 320′ east of Third Avenue to "DK" Tower; also station tracks at Water Street Station, Cleveland, Ohio. Office Div. Engr. Scale 1″—100′. Youngstown, Ohio, August 1, 1928. File No. 95-10305-1, marked Exhibit "A") a distance of 2,093 feet to a point of connection with the connecting track of the Erie (shown as point "C" on said Exhibit "A"); thence over said connecting track a distance of 1,824 feet to a point of connection with a yard track of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (shown as point "D" on said Exhibit "A"); also two passenger terminal tracks and crossover at said Superior Avenue Station of a total length of 1,446 feet, said tracks and crossover of the Erie being shown in solid red line on said Exhibit "A."

Article II

The movement of the Wheeling's trains over the Erie tracks shall be under such regulations as may be prescribed by the Superintendent or other proper officer of the Erie and shall be by the engines and crews of the Wheeling, provided that the crews of the Wheeling operating said trains shall submit to such tests and examinations by the Erie as may be prescribed by its Superintendent or other proper [fol. 192] officer and shall be found competent to his satisfaction to operate said trains over said tracks with proper regard for the rules of the Erie and the safety of the trains of the Erie; and provided further that until such tests and

examinations have been made and such crews have been found satisfactory to the Erie the operations of said trains over said tracks shall be under the direction of a pilot or pilots to be furnished by the Erie and paid for by the Wheeling.

The trains of the Wheeling shall have equal rights with the trains of the Erie of the same class, and in arranging schedules there shall be no discrimination against the trains of the Wheeling; provided that where the trains of either party have to give place, the one to the other, the trains of the Erie shall have the preference.

Article III

The Erie shall furnish to the Wheeling and its passengers and patrons at said Superior Avenue station such passenger station facilities and service as are usually furnished at passenger stations, to include inter alia, the following:

(a) Information, by clerks, bulletin boards, notices and otherwise, as to the arrival and departure of the Wheeling's trains.

(b) The sale and accounting for passenger tickets of the Wheeling.

(c) The receiving, checking and delivering of baggage and the sale of and accounting for excess baggage checks.

(d) The receiving and dispatching of United States mail and of railroad mail, newspapers, company materials and supplies, handled in baggage service to and from trains of the Wheeling.

(e) The receipt and delivery of milk on inbound trains, and loading of empty milk cans for return movement.

(f) Ample space for the receipt, delivery and storage of express shipments via the lines of the Wheeling.

(g) Access to the following: Public telephone and telegraph, public toilets, parcel checking, lavatories and waiting rooms for men and women, facilities for the operation of taxicabs, transfer busses and transfer baggage trucks; and reasonable locker space for conductors and trainmen.

[fol. 193] Article IV

The Erie shall have charge of the maintenance of the tracks herein described, but in the event the Wheeling calls the attention of the Erie to conditions of said tracks, roadbeds or appurtenant facilities which the Wheeling considers unsafe, and the Erie fails within thirty (30) days after such notice to make such repairs or to do such work as will make he same safe then and in that event the Wheeling may make such repairs or do such work, charging the Erie for the cost thereof, which charges shall be promptly paid.

Article V

As compensation for the rights given to the Wheeling under this agreement, the Wheeling shall pay to the Erie monthly (or pro rata for any fraction of a month) throughout the period during which the Wheeling exercises the aforesaid rights, amounts equal to the following:

1. As to the New Track, 2,093 Feet in Length—construed between the said points "B" and "C":

(a) Eight per cent per annum on the actual cost of said track to cover interest and taxes thereon.

(b) Eight per cent per annum on Twenty Two Thousand ($22,000.) Dollars being the value agreed upon for the purposes of this agreement, of 22,000 sq. ft. of land occupied by said new track.

(c) The actual cost of maintenance and repair of said new track and appurtenances.

(d) The wages paid to crossing watchmen (together with the cost of supplies therefor) to be stationed at West Third Street to protect the movement of Wheeling trains at said crossing; such wages to be at prevailing rates in effect during the life of this agreement.

(e) Fifteen per cent of each item of cost under subdivisions (c) and (d) above, to cover cost of superintendence and overhead.

[fol. 194] 2. For Switch Tenders and Interlocking:

(a) The wages paid to necessary switch tenders (together with the cost of supplies therefor) to operate hand throw switch located near N. Y. C. & St. L. overhead bridge, to protect Wheeling trains; such wages to be at the prevailing rates in effect during the continuance of this agreement. One of such switch tenders shall be a qualified yard man who can act in the capacity of a pilot. Also fifteen per cent of the amount of said wages and cost of said supplies, to cover cost of superintendence and overhead.

(b) A portion of Erie's portion of the cost of operating and maintaining "DK" Interlocking Tower; the Erie's portion to be divided between the Wheeling and the Erie on the basis of movements through said interlocker for and on account of the Erie and the Wheeling.

3. For Trackage Over Track From "C" to "D":

One Dollar and Thirty Two Cents ($1.32) for each round trip, a round trip to cover the movement of the loaded train and the return movement of the empty equipment for each train, operated by the Wheeling over this track; provided, however, that no charge shall be made by the Erie to the Wheeling for any movements of switch engines reasonably necessary for the placement or removal of cars or trains or for any movements of railway mail cars placed in advance of the placement of trains.

4. For Joint Use of Passenger Station, Tracks, Platforms and Appurtenances:

(a) A portion of wages paid to Ticket Agent, Chief Clerk, Ticket Clerks, Ticket Clerk and Operator, Matron, Janitor; a portion of the cost of trucking refuse and ashes, a portion of the cost of City water, lights, coal, repairs to building and heating plant; said wages and costs to be divided between the Wheeling and the Erie on the basis of the ticket sales for and on account of each company.

(b) Fifteen per cent of each item enumerated above under "a" to cover the costs of superintendence and overhead.

[fol. 195] (c) Platform Costs: A portion of the wages paid to Station Master, Baggage Clerk, Baggage Porters and Car Inspectors; a portion of the cost of repairs to platforms and tracks, and of necessary supplies; said wages

and costs to be divided between the Wheeling and the Erie on the basis of the number of passenger trains handled for, and on account of each company.

(d) Fifteen per cent of each item of cost enumerated in above paragraph "c," to cover cost of superintendence and overhead.

(e) A portion of amounts paid for land rental, taxes, insurance of tracks, buildings, platform and train sheds:—It is agreed that rental paid by the Erie on lands, less credits from other companies, amounts to Three Hundred and Fifty Six ($356) Dollars per annum; this sum in addition to amounts paid from time to time for taxes and insurance shall be divided between the Erie and the Wheeling on the basis of ticket sales for and on account of each company.

(f) Six per cent interest on the valuation of the Superior Avenue Station, intervening tracks, etc.—It is agreed that this amounts to Seventy Five Hundred and Eleven Dollars and Seventy One Cents ($7511.71) per annum and this amount is to be divided between the Wheeling and the Erie on the basis of ticket sales for and on account of each company.

Revenues derived from pay toilets and slot machines will be divided between the Wheeling and the Erie on the basis of ticket sales for and on account of each company.

Article VI

Each party hereto shall assume and pay any penalty imposed by reason of penalty defects of any kind of equipment in its possession or moved by it over said tracks, and for the violation by it or its employes of any pertinent statute, ordinance or regulation.

[fol. 196] Article VII

For the purpose of fixing liability as between the parties hereto for loss or damage to baggage or injury to or death of any person arising from or connected with such joint use of said passenger station, it is agreed as follows:

(a) The local arrival or delivery of a passenger or baggage for transportation shall constitute the same to be the

passenger or baggage of the party over whose line the same is to be transported.

(b) When a passenger has alighted from the trains of one party or baggage has been unloaded therefrom but not for transferring to the line of the other party, such passenger or baggage shall be deemed to be that of the party from whose train such passenger alighted or baggage was unloaded.

(c) When a passenger has alighted from the train of either party or baggage has been unloaded therefrom for transfer to the line of the other party, the same shall be deemed the passenger or baggage of the party over whose line the same is to be thence transported.

Article VIII

In the event of damage to property or injury to or death of persons occurring on or about said tracks jointly used hereunder, or on or about the passenger station of the Erie, it is agreed that liability therefor shall, as between the parties hereto, be assumed and borne by and between them as follows:

(a) When caused by the sole negligence of either party hereto, its officers, agents or employes, or by the negligence of either party its officers, agents, or employes, combined with the negligence of a third party, liability therefor shall be borne and paid by the party hereto so at fault; providing that in case a train of either party is derailed or thrown from the track, such party shall be liable for loss and damage to its property, property in its charge and property of third persons, and for injuries to or death of persons in its employ or in its charge, or to third persons, unless the same be caused by collision of the trains of the parties [fol. 197] hereto, in which case liability shall be assumed by the parties hereto respectively as otherwise provided in this article.

(b) When caused by the negligence of both parties hereto, their officers, agents or employes, including station employes, or when occurring without negligence, or if the cause of any such loss, damage, injury or death cannot be ascertained, or if it cannot be determined whose negligence

caused the same, each party shall bear and pay all loss, damage or injury to its employes and property, and to persons and property in its charge; provided, however, that liability for such loss, damage, injury or death (excepting that with respect to persons or property as defined in Article VII hereof) growing out of or in connection with the use and maintenance of said passenger station while being jointly used hereunder, shall be borne and paid by the parties hereto in the same proportion that they at the time thereof share in the expense of operating the joint passenger station.

Each party shall indemnify and save the other harmless from all loss, damage or injury, the liability for which is so assumed by it, and from all claims therefor and expenses arising therefrom.

Article IX

In case any claim is made or suit or action is begun against any of the parties hereto for loss or damage to or injury to or death of persons, covered by Article VIII hereof, such party shall give prompt and reasonable notice in writing to the other of such claims or the commencement of any suit or action, and thereupon such other party may, at its option, join in the conduct and defense of such claim, suit or action.

Article X

In the event of any dispute or disagreement between the parties hereto growing out of this agreement, including differences of opinion, said dispute or disagreement shall be submitted to a board of arbitration, composed of three members, all of whom shall be disinterested and experienced in railroad operation, to be selected as follows: The [fol. 198] party desiring the arbitration shall select one arbitrator, and in writing notify the other party of such selection and of the points upon which arbitration is desired, whereupon the other party shall within ten (10) days after receipt of such written notice, select a second arbitrator, notifying the other party in writing of such selection; the two arbitrators so chosen shall within ten (10) days thereafter, choose a third arbitrator. In the event such party fails to select an arbitrator within such period, the arbitra-

tor first selected shall choose such second arbitrator and the two so selected shall choose a third; provided that in the event the two arbitrators so chosen by the parties in either of said ways shall fail to agree upon the third arbitrator, the same shall be appointed by the United States District Judge for the Eastern Division of the Northern District of Ohio. The award or finding of said arbitrators, or a majority thereof, shall be rendered within twenty (20) days after submission to them and shall be final and binding upon the parties hereto.

Article XI

The term of this agreement shall begin five (5) days after receipt of written notice from the Wheeling to the Erie that the Wheeling is ready to use the said passenger station facilities and service at the Superior Avenue station, and shall extend until the Cleveland Union Terminals Company shall be prepared to furnish passenger station facilities and service to the Wheeling in said Union Depot and then may be terminated on five (5) days written notice from either party to the other, and at the end of said five (5) days period the Wheeling shall cease using the said Erie facilities and this agreement shall terminate and become void except as to any moneys that may be due from one party hereto to the other.

It is further agreed that should the Cleveland Union Terminals Company not, prior to June 1, 1940, furnish passenger station facilities to the Wheeling as contemplated in this agreement, or should the Wheeling fail to avail itself of such facilities or to provide passenger facilities at some other location prior to that date, then this agreement will automatically terminate and become void [fol. 199] on the first day of June, Nineteen Hundred and Forty (1940) which date is the end of the full term of a certain lease and agreement entered into on January 5, 1881, between the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Co. (a predecessor of the Cleveland, Cincinnati, Chicago & Saint Louis Railway Company) and The New York, Pennsylvania and Ohio Railroad Company (a predecessor of The Nypano Railroad Company, lessor of the party of the first part) under which said agreement of January 5, 1881, the Erie is provided with its present pas-

senger station facilities, which it agrees to furnish jointly with the Wheeling under this agreement, and this agreement is made subject to all of the covenants and conditions set forth in said agreement of January 5, 1881, and agreements supplemental thereto and amendatory thereof.

This agreement shall inure to the benefit of and shall be binding upon the successors, lessees and assigns of the parties hereto, respectively.

Article XII

This agreement is made subject to all existing and future federal and state laws and to all rules or orders made by any board, commission or body having competent authority to regulate any of the parties hereto and to the specific approval and authorization of the Interstate Commerce Commission (if required by law). In case it should be found to conflict with any such law, rule or order it shall be modified to conform thereto.

[fol. 200] In Witness Whereof the parties hereto have caused these presents to be signed by their respective proper officers and their corporate seals to be hereunto attached and duly attested as of the day hereinbefore first written.

Erie Railroad Company, by (Signed) J. J. Bernet, President.

Attest: (Signed) Geo. H. Minor, Secretary. (Corporate Seal.)

The Wheeling and Lake Erie Railway Company, by (Signed) Geo. Durham, Vice President.

Attest: (Signed) C. E Bahl, Secretary. (Corporate Seal.)

Signed, sealed and acknowledged in the presence of: (Signed) Geo. F. Brownell, (Signed) A. L. Travis, as to Erie Railroad Company. (Signed) John A. McCort, (Signed) J. L. Fenton, as to the Wheeling and Lake Erie Railway Company.

State of New York,
County of New York, ss:

Before me, a Notary Public, in and for said County and State, personally appeared J. J. Bernet and Geo. H. Minor,

to me known and known to me to be respectively the President and Secretary of the Erie Railroad Company, one of the corporations which executed the foregoing instrument, and acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said Corporation and were authorized so to do; and that said instrument is their free act and deed indi- [fols. 201 & 202] vidually and as such President and Secretary, and the free and corporate act and deed of the Erie Railroad Company.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal at City of New York, N. Y., this 5th day of December, 1928.

(Signed) A. L. Travis, Notary Public, Kings County, No. 215. Certificate filed in New York Co. No. 87. Commission expires March 30, 1929. N. Y. County Register's Office No. 9108. Kings County Register's Office No. 9006. (Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

Before me, a Notary Public, in and for said County and State, personally appeared George Durham and C. E. Bahl, to me known and known to me to be respectively the Vice President and Secretary of The Wheeling and Lake Erie Railway Company, one of the corporations which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such Vice President and Secretary in behalf of said corporation and were authorized so to do, and that said instrument is their free act and deed individually and as such Vice President and Secretary, and the free and corporate act and deed of The Wheeling and Lake Erie Railway Company.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal at Cleveland, Ohio, this 7th day of December, 1928.

(Signed) John A. McCort, Notary Public. (Seal.)

[fol. 203] Exhibit 3, Part 2

This agreement made and entered into in duplicate this twenty-fifth (25th) day of July, 1928, effective as of December 7, 1928, by and between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, hereinafter called the "Big Four Company" and The Wheeling and Lake Erie Railway Company, a corporation, hereinafter called the "Wheeling Company", witnesseth:

Whereas, upon the completion of the union depot of The Cleveland Union Terminals Company, in the City of Cleveland, Ohio, the Wheeling Company proposes to accept passenger station facilities and service therein in lieu of the passenger station facilities and service which it provides in its Ontario Street passenger station in the City of Cleveland, Ohio; and

Whereas, the Wheeling Company has entered into an agreement with the Erie Railroad Company (hereinafter referred to as the "Erie Company") providing that, pending completion of said union depot, the Erie Company will furnish to the Wheeling Company passenger station facilities and service in the Superior Avenue station of the Erie Company and granting to the Wheeling Company the right to operate passenger trains over tracks owned by the Erie Company (a) at said Superior Avenue station and (b) intervening between said station and tracks of the Wheeling Company; and

Whereas, in connection with the use by the Wheeling Company of the tracks and station facilities of the Erie Company, the Wheeling Company desires to secure the right to operate its passenger trains over certain tracks of the Big Four Company located between their connection with the tracks of the Erie Company at "DK" interlocking tower and St. Clair Street, which right the Big Four Company is willing to grant to the Wheeling Company under the terms and conditions hereinafter stipulated;

[fol. 204] Now, therefore, in consideration of the agreements herein made and of the payments to be made by the Wheeling Company as hereinafter provided, it is mutually agreed as follows:

First. That the Big Four Company hereby grants to the Wheeling Company, for its passenger trains only, the right to use, in either direction and jointly with the Big Four Company and its other tenants, certain tracks and appurtenant facilities of the Big Four Company within the city of Cleveland, Cuyahoga County, Ohio; the tracks of the Big Four Company so to be used being: (a) Eastward Main Track from the connection with the Erie Railroad Company, at approximately the easterly right of way line of the Big Four Company near "DK" Interlocking Tower, northwardly a distance of about four thousand ninety nine (4099) feet to the south line of St. Clair St., the termini being shown as A-B on the attached blueprint; and (b) Westward Main Track from a point about three hundred (300) feet north of said point of connection of the Big Four Company's eastward main track northwardly a distance of about one thousand eight hundred and thirty (1830) feet to a point about two hundred and forty (240) feet south of the south bank of the Cuyahoga River, the termini being shown as D-E on the attached blueprint; it being understood that the use herein granted by the Big Four Company to the Wheeling Company includes passage through the crossovers C-D and E-F connecting said jointly used main tracks and located respectively one at the Erie Railroad Company's said connection near "DK" Tower and the other at the south end of the Big Four Company's bridge over the Cuyahoga River, also the portions of tracks G-H (81 feet) and M-N (380 feet) connecting with the Erie Railroad Company's station tracks.

The Big Four Company's tracks to be used jointly by the Wheeling Company are shown by solid red lines upon blueprint hereto attached and made a part hereof.

Second. All of said tracks shall be used for the handling of the passenger trains of the Wheeling Company, and the Big Four Company, if considered necessary, shall furnish pilots therefor; such pilots, for the purpose of this agreement, to be deemed the sole employes of the Wheeling Company.

[fol. 205] Third. The Wheeling Company shall pay to the Big Four Company, monthly, at the rate of Two Dollars and Sixty-five Cents ($2.65) per train per round trip for

all the tracks and facilities so used during the month; provided, however, that no charge shall be made by the Big Four Company to the Wheeling Company for any movements of switch engines reasonably necessary for the placement or removal of passenger train cars or passenger trains or for any movements of railway mail cars placed in advance of the placement of trains; and the Wheeling Company, in addition, shall pay the wages of pilots, if furnished by the Big Four Company, and any and all additional operating costs, such as the employment of special switch tenders, necessary for or incident to the particular handling of said passenger trains of the Wheeling Company. The wages of men operating the Wheeling Company's trains and engines, and all other costs and expense in connection therewith, shall be paid by the Wheeling Company.

Fourth. The Wheeling Company shall, within thirty (30) days after the Big Four Company shall have rendered bills for the amounts due under the provisions of this agreement, make full and lawful payment thereof without default.

Fifth. The movement of the Wheeling Company's trains and engines over the Big Four Company's railroad as covered by this agreement shall be at all times subject to the operating rules and regulations prescribed by the Superintendent of the Big Four Company; provided, however, that the movement of the trains of all carriers using said tracks be so regulated that they shall have equal opportunities thereover with as little delay as possible.

Sixth. The Big Four Company shall not be deemed an insurer at any time or in any sense of the safe condition of its said tracks and other facilities subject to joint use hereunder.

The Big Four Company shall have charge of the maintenance of the tracks herein described, but in the event the Wheeling Company calls the attention of the Big Four Company to conditions of said tracks, roadbeds or other facilities which the Wheeling Company considers unsafe and the [fol. 206] Big Four Company fails within thirty (30) days after such notice to make such repairs or to do such work as will make the same safe, then and in that event the Wheeling Company may make such repairs or do such work,

charging the Big Four Company for the cost thereof which charges shall be promptly paid.

Seventh. For the purpose of defining the liabilities of the parties hereto, as provided for in this Article, it is agreed between them as follows:

Section 1. Agents, telegraph operators, train dispatchers, levermen, towermen, bridge tenders and operators, laborers, watchmen, switchmen and other persons employed in the maintenance, care or operation of said jointly used tracks or facilities, shall, in respect to the liability of the parties hereto to each other, or to persons not parties hereto, growing out of the fault or neglect of such agents or employes, be deemed and held to be the sole employes of the party, to or upon, or in connection with whose trains or property any loss or damage may have accrued. Employes of either party engaged in removing joint wreckage shall be deemed the joint employees of the parties hereto.

Section 2. Each party hereto shall assume, bear and pay all loss, damage or injury that itself, its sole employes or persons or property in its care or custody or on its cars shall suffer, caused by any defect in any track, structure, appliance, appurtenance or equipment, the joint use of which is herein granted or hereunder enjoyed, or caused by failure of the Big Four Company to repair such defect or to maintain such properties in proper condition or to observe any regulations prescribed by law for the safety of the public or of said properties.

Section 3. In every case of loss, damage or injury to property or injury to or death of persons (except as otherwise provided for in this agreement) which shall in any manner originate or occur upon or adjacent to any of said tracks and other facilities subject to joint use hereunder, the liability shall be apportioned as follows:

(a) Each party hereto shall be deemed solely liable for the negligence or default of its own sole officers, agents or [fol. 207] employes, (except as otherwise provided for in this agreement) and for all loss, damage or injury done or caused by and involving solely trains, cars or engines in its possession without default or negligence of the other party hereto.

(b) Each party hereto shall assume, bear and pay all loss, damage or injury which itself (including its equipment, or its sole employes, or persons or personal property in its care or custody or on cars or engines in its possession or persons injured or property damaged by cars or engines in its possession shall suffer, caused (1) by fault of its sole employes combined with the fault of the sole employes of the other party hereto, or (2) by fault of the sole employes of both parties hereto, combined with the fault of third parties, or (3) by fault of its sole employes in conjunction with that of third parties, or (4) when the cause thereof shall be so concealed that it cannot be determined whose employe or employes, as between the parties hereto, was or were at fault, or (5) when loss of or damage to personal property is caused by fire and without fault.

(c) If any injury to or death of third persons or loss or damage to their property, not in the custody or care or upon the cars or engines in the possession of either party hereto, or loss or damage shall occur to the tracks, roadbed, structure and appurtenances covered by this agreement, caused (1) by the default or negligence of the sole employes of both parties hereto or (2) by the default or negligence of the sole employes of both parties hereto combined with that of third parties or both, each party hereto shall assume, bear and pay one-half (½) of the cost thereof and of any expense incident thereto.

(d) If any loss, damage or injury shall be caused (1) in a manner defined in clause (b), but to person or property not therein mentioned, or (2) under circumstances not therein or elsewhere herein provided for, the amount required to discharge any consequent liability and expense shall be divided equally between the parties hereto.

Section 4. If any claim is made or suit or action is begun against one of the parties hereto for or on account of any loss, damage or injury, for which the other party hereto is solely or jointly liable hereunder, such party shall within ten (10) days from the filing of such claim, or the commencement of such suit or action, serve written notice [fol. 208] thereof upon the other party, and thereupon such other party shall, if solely liable, assume the defense of

such claim, suit or action and shall hold harmless the party sued or against which the claim is made. If such other party is jointly liable hereunder, it may, if it so elects, join in the conduct and defense of any such claim, suit or action, and in the event of its failure so to do, the party sued, or against which the claim is made, shall conduct such defense and the other party shall, upon presentation of bill therefor, pay to the party conducting such defense, its proportion of the damages, judgments, recoveries, costs and expenses.

Eighth. If at any time a question shall arise between the parties hereto concerning the construction of any part of this agreement, or as to any practical business question growing out of the same, or concerning the observance or performance of any of the conditions herein contained, upon which question the parties hereto cannot agree, such question shall be submitted to the arbitrament of three disinterested persons to be chosen, one by the party to each side of the controversy, and one by the two arbitrators so chosen. The party desiring such arbitration shall select its arbitrator, and give written notice thereof to the other party, and shall in such notice state precisely the nature of the matters which it is proposed to bring before the aribtrators; and only the matters so stated shall be considered or decided by them. If the party receiving such notice shall fail to name an arbitrator within ten (10) days after notice, as aforesaid, has been by the other party given to it, the arbitrator named by the party giving such notice may and shall name and appoint an arbitrator for and in behalf of the party so in default; and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by such party. If the two arbitrators so chosen shall fail to select a third arbitrator within ten (10) days after the selection of the second arbitrator, as aforesaid, such third arbitrator may be appointed, upon ten (10) days' notice by either party to the other party of its intention to make application therefor, by any Judge of the District Court of the United States for the district in which the said tracks herein described shall then be located. The arbitrators shall, as soon as possible after their selec- [fol. 209] tion, meet to hear and decide the question submitted to them and shall give each party reasonable notice

of the time and place of such meeting. After hearing both parties and taking such testimony or making such investigation as they may deem necessary, they shall make in writing their award upon the question or questions submitted to them, and shall serve a copy of such award upon each party hereto, and the award of such arbitrators, or majority of them, shall be final and binding upon each of the parties hereto, and each shall promptly conform thereto. The books and papers of each party hereto, so far as they relate to matters submitted to arbitration, shall be open to the examination of the arbitrators; said arbitrators shall agree upon the amount of the fees and expense of the arbitration to be borne by each party hereto. Until the arbitrators shall have made their award upon any questions submitted to them, the business, settlements and payments to be transacted and made under this agreement shall continue to be transacted and made in the manner and form existing prior to the arising of such questions.

Ninth. The term of this agreement shall begin five (5) days after receipt of written notice from the Wheeling Company to the Big Four Company that it desires to exercise said right of joint operation over the tracks of the Big Four Company and shall end upon the date when The Cleveland Union Terminals Company is ready to furnish passenger station facilities and service to the Wheeling Company in said union depot, written notice whereof shall be given by the Wheeling Company to the Big Four Company five days in advance thereof.

Tenth. This agreement shall inure to the benefit of and shall be binding upon the respective successors, lessees and assigns of the parties hereto.

Eleventh. This agreement is made subject to all existing and future federal and state laws and to all rules or orders made by any board, commission or body having competent authority to regulate any of the parties hereto and to the specific approval and authorization of the Interstate Commerce Commission (if required by law). In case it should be found to conflict with any such law, rule or order it shall be modified to conform thereto.

[fol. 210] In Witness Whereof, the parties hereto have caused these presents to be signed by their respective proper officers, and their corporate seals to be thereunto attached and duly attested as of the day and year first above written.

The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, by (Signed) P. E. Crowley, President.

Attest (Signed) E. F. Stephenson, Secretary. (Corporate Seal.)

The Wheeling and Lake Erie Railway Company, by (Signed) Geo. Durham, Vice-President.

Attest (Signed) C. E. Bahl, Secretary. (Corporate Seal.)

Witnessed by: (Signed) F. J. Sweeney, (Signed) B. H. Sheffer. (Signed) John A. McCort, (Signed) J. L. Fenton.

State of New York,
County of New York, ss:

Before me, a Notary Public, in and for said County and State, personally appeared P. E. Crowley and E. F. Stephenson, to me known and known to me to be respectively the President and Secretary of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, one of the corporations which executed the foregoing instrument, and acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and were authorized so to do; and that said instrument is their free act and deed individually and as such President and Secretary, and the free and cor-
[fols. 211 & 211½] porate act and deed of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at New York, N. Y., this 12 day of Nov., 1928.

(Signed) J. M. O'Mahoney, Notary Public. Notary Public, Bronx County. Clerk's No. 17, Register's No. 3020. Certificate Filed in New York County. Clerk's No. 130, Register's No. 0-91. My commission expires March 30, 1930. (Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

Before Me, a Notary Public, in and for said County and State, personally appeared George Durham and C. E. Bahl, to me known and known to me to be respectively the Vice President and Secretary of The Wheeling and Lake Erie Railway Company, one of the corporations which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such Vice President and Secretary in behalf of said corporation and were authorized so to do, and that said instrument is their free act and deed individually and as such Vice President and Secretary, and the free and corporate act and deed of The Wheeling and Lake Erie Railway Company.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at Cleveland, Ohio, this 7th day of December, 1928.

(Signed) John A. McCort, Notary Public. (Seal.)

[fol. 212] Exhibit 3, Part 3

Whereas, The Cleveland Union Terminals Company, (hereinafter referred to as the "Terminals Company") and The Wheeling and Lake Erie Railway Company (hereinafter referred to as the "Wheeling Company") entered into a contract under date of the 27th day of November, 1928, whereby the Terminals Company, under the provisions of Article I, Section 3, is obligated to furnish the Wheeling Company with temporary passage terminal facilities in the Superior Avenue Station of the Erie Railroad Company and the use of the tracks of the Erie Railroad Company and The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company necessary to reach said Superior Avenue Station; and

Whereas, the Erie Railroad Company, The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company and the Wheeling Company have agreed upon the terms and conditions upon which the Terminals Company shall secure for the Wheeling Company the temporary passenger facil-

ities referred to above, copies of which said contracts are attached hereto; and

Whereas, the Terminals Company, under the said contract with the Wheeling Company, is obligated to pay all of the cost and expense and indemnify the Wheeling Company against all liability incurred in furnishing the Wheeling Company with such temporary passenger facilities pursuant to the said contract first above referred to;

Now, Therefore, this instrument is to evidence the following:

1. The contracts attached hereto between (a) The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company and the Wheeling Company and between (b) the Erie Railroad Company and the Wheeling Company have been or will be executed by the Wheeling Company at the request of the Terminals Company, and treated together with this instrument as the Exhibit B referred to in said original contract between the Wheeling Company and the Terminals Company first above mentioned, and are hereby approved by the Terminals Company. The Terminals Company [fol. 213] hereby assumes each and all of the obligations imposed upon the Wheeling Company under the terms of the said contracts respectively, pursuant to its obligations to the Wheeling Company under the contract between the parties first above referred to and shall pay to the Wheeling Company, upon fifteen days' notice, any bill or indebtedness the Wheeling Company may be obligated to pay to The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company and the Erie Railroad Company under said contracts.

2. The obligation of the Terminals Company to furnish the Wheeling Company with temporary facilities is a continuing obligation expiring only when the Terminals Company furnishes the Wheeling Company with the permanent passenger facilities and the execution by the Wheeling Company, at the request of the Terminals Company, of the contract with the Erie Railroad Company referred to in Section 1 hereof, providing for a definite expiration date which may or may not occur before the Terminals Company begins to furnish the Wheeling Company with the permanent

passenger station facilities, shall not be construed as complete compliance with the Terminals Company's obligation to furnish temporary passenger facilities, and in the event the said contract with the Erie Railroad Company terminates before the Terminals Company furnishes the Wheeling Company with such permanent passenger facilities, the Terminals Company shall have the option to substitute the station facilities of the Baltimore & Ohio Railroad therefor, or in the event of inability so to do, the Wheeling Company shall have the option to treat such breach in that respect as a breach similar to that provided for in Article III, Section 1 of the aforesaid contract dated the 27th day of November, 1928, and furnish itself with a passenger station and facilities upon its own property at the expense of the Terminals Company as provided in said Article III, Section 1.

3. This instrument is subject to all existing and future federal or state laws, and to all rules or orders by any board, commission or body having competent authority to regulate any of the parties hereto, and to the approval and authorization of the Interstate Commerce Commission (if required by law). In case it should be found to conflict with [fol. 214] any such law, rule or order it shall be modified to conform thereto.

In Witness Whereof, the parties hereto have caused these presents to be signed by their respective proper officers, and their corporate seals to be hereunto attached and duly attested the 7th day of December, 1928.

The Cleveland Union Terminals Company, by
(Signed) C. L. Bradley, President.

Attest: (Signed) Charles W. Stage, Secretary. (Corporate Seal.)

Signed, sealed and acknowledged in the presence of: (Signed) A. J. Hoffman, (Signed) L. W. Stressing, as to the Cleveland Union Terminals Company.

The Wheeling and Lake Erie Railway Company, by
(Signed) W. M. Duncan, Chairman of the Board.

Attest: (Signed) C. E. Bahl, Secretary. (Corporate Seal.)

(Signed) J. A. McCort, (Signed) J. L. Fenton, as to the Wheeling and Lake Erie Railway Company.

[fol. 215] State of Ohio,
Cuyahoga County, ss:

Personally appeared before me the undersigned, a Notary Public, in and for said County and State, C. L. Bradley and Charles W. Stage to me known and known to me to be the President and Secretary, respectively, of The Cleveland Union Terminals Company, one of the corporations which executed the foregoing instrument, who severally acknowledged to me that they did sign and seal said instrument as such President and Secretary, respectively, for and on behalf of said corporation and that the same is their free act and deed as such officers and the free and corporate act and deed of said The Cleveland Union Terminals Company.

In Witness Whereof, I have hereunto set my hand and official seal this 7th day of December, 1928.

(Signed) Arthur J. Hoffman, Notary Public. (Notarial Seal.)

State of Ohio,
Cuyahoga County, ss:

Personally appeared before me the undersigned, a Notary Public in and for said County and State, W. M. Duncan and C. E. Bahl to me known and known to me to be the Chairman of the Board and Secretary, respectively, of The Wheeling and Lake Erie Railway Company, one of the corporations which executed the foregoing instrument, who severally acknowledged to me that they did sign and seal said instrument as such Chairman of the Board and Secretary, respectively, for and on behalf of said corporation and that the same is their free act and deed as such officers and the free and corporate act and deed of said The Wheeling and Lake Erie Railway Company.

In Witness Whereof, I have hereunto set my hand and official seal this 7th day of December, 1928.

(Signed) John A. McCort, Notary Public. (Notarial Seal.)

[fols. 216-218] BEFORE INTERSTATE COMMERCE COMMISSION

[Title omitted]

Finance Docket No. 7298

RETURN TO QUESTIONNAIRE No. 1

The Wheeling and Lake Erie Railway Company, having made application to the Interstate Commerce Commission, [fol. 219] under paragraph (18) of Section 1 of the Interstate Commerce Act for authority (a) to operate in passenger and allied services, for a period of 100 years, a proposed connecting track and passing siding of The Cleveland Union Terminals Company; (b) to acquire, for a period of 100 years, passenger station facilities and service in the new union depot of The Cleveland Union Terminals Company; and (c) to operate, temporarily, a portion of an industrial siding track of the applicant, tracks and station facilities of the Erie Railroad Company and tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, all in the City of Cleveland, Ohio, which aplication is filed in the office of the Commission in Finance Docket No. 7298, hereby affirms that notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, beginning on December 10, 1928, in The Cleveland Plain Dealer, The Cleveland News, and The Cleveland Press, which are newspapers of general circulation in the City of Cleveland and in the County of Cuyahoga, Ohio; that Cuyahoga County, Ohio, is the only county in which the said lines of railroad are located, and that the newspaper clippings hereto attached contain true copies of the notices as published in said newspapers.

The applicant also submits the following information required by the Commission:

Question 1. The essential facts relied upon to support the statement that the applicant is a carrier by railroad, engaged in the transportation of passengers or property, subject to the inter-tate commerce act, or is a corporation organized to construct and operate a railroad.

Answer. The applicant was incorporated as a common carrier railroad December 14, 1916, under the laws of the State of Ohio. Since January 1, 1917, it has operated lines of railroad in the State of Ohio for the transportation of passengers and property in interstate commerce and in intrastate commerce, and from time to time it has filed with the Interstate Commerce Commission tariffs stating its [fol. 220] rates, fares and charges for the transportation of passengers and property in interstate commerce and the various periodical reports required by the Commission of Class I carriers engaged in interstate commerce.

Question 2. Whether the proposed new line of railroad will be both constructed and operated by the applicant.

Answer. The tracks and station facilities of The Cleveland Union Terminals Company (hereinafter called the "Terminals") proposed to be operated for and on behalf of the applicant are in process of construction under the authority given the Terminals by the certificate of public convenience and necessity issued by the Commission in The Cleveland Passenger Terminal Case, Finance Docket No. 1237, 70 I. C. C. 659, 671. The industrial siding track of the applicant, the tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company (hereinafter referred to as the "Big Four"), and the tracks and station facilities of the Erie Railroad Company (hereinafter referred to as the "Erie"), proposed to be operated or utilized by the applicant, are already in existence.

Question 3. Whether or not any corporation, individual, or trustee, holds control over the applicant at the date of filing this return. If control is so held:

(a) The form of control, whether sole or joint, and whether in trust.

(b) The name and business address of the controlling corporation, individual, or trustee.

(c) The manner in which control was established.

(d) The extent of control.

(e) Whether control is direct or indirect.

(f) The name and business address of the intermediary through which control, if indirect, was established and is exercised.

[fol. 221] (g) The name and business address of the beneficiaries, for whom the trust, if any, is maintained.

(h) The purposes of the trust.

Answer. No corporation, individual or trustee holds control over the applicant at the time of the filing of this return.

Question 4. Whether the applicant is connected by common stock ownership, or otherwise, with any industry to be served by the proposed line. If so, state the facts.

Answer. The applicant is to serve no industries on the tracks proposed to be operated by it or on its behalf.

Question 5. Amount and kind of capital stock (a) authorized, and (b) issued, for construction of the proposed line.

Answer. No capital stock has been authorized or issued for construction of the proposed line.

Question 6. The chief purposes and functions of the proposed line.

Answer. The chief purposes and functions of the tracks and station facilities proposed to be operated by or for and on behalf of the applicant are to furnish the applicant with passenger station facilities and service in the down-town district of Cleveland (a) for a period of 100 years in the union depot of the Terminals; and (b) pending the completion of said union depot, in the Superior Avenue station of the Erie.

Question 7. The classes of service to be performed, as passenger, freight, express and switching.

Answer. The only classes of service to be performed over these tracks are passenger and allied services, including the transportation of express, baggage, mail and milk.

Question 8. The kind of motive power to be used. If electric power, state source and estimated cost.

[fol. 222] Answer. Steam motive power will be used for the temporary operation by the applicant over its industrial siding track, over the tracks of the Big Four, and over the tracks and into the station of the Erie. Electric motive power will be used by the Terminals for the handling of the applicant's trains between the applicant's main line and the union depot of the Terminals. The Terminals proposes to furnish passenger station facilities and service to the applicant upon an annual rental basis, and applicant is not advised as to the source or cost of the electrical energy proposed to be used by the Terminals for this purpose.

Question 9. Whether the proposed line will receive material revenue from the territory traversed, or serve any material public convenience and necessity of the local territory. If the answer is "no," the applicant may elect to omit answers to questions 10 to 21, inclusive.

Answer. The operations by the applicant over the tracks or line of railroad hereinbefore referred to will produce material revenue and will serve a material convenience and necessity of the traveling public. Thus, it will enable the applicant to continue to transport passengers, baggage, express and mail to and from the down-town section of Cleveland and to receive material revenue therefrom. It will provide the traveling public using the lines of the applicant the excellent passenger facilities and service to be afforded by the union depot of the Terminals at a site somewhat nearer the public square in Cleveland than the present Ontario Street passenger station. It will enable the members of the traveling public using the lines of the applicant to make direct connections with other steam railroads and the rapid transit line which propose to enter and use the union depot.

Question 10. The name and population of each county in which the proposed new line of railroad will be situated, and the name and population of each city, town and village at which a station will be established, together with its distance from a designated initial point, with the source of information as to population.

[fol. 223] Answer. The lines of railroad proposed to be operated by the applicant are situated in the City of Cleveland, Cuyahoga County, Ohio. According to the 1920 census, the population of Cleveland was 796,841; of Cuyahoga County, 943,495. The Bureau of Census estimates that as of 1926 the population of Cleveland was 960,500, and of Cuyahoga County, 1,148,400; and that as of 1928 the population of Cleveland was 1,010,300.

Question 11. The names of places mentioned in paragraph 10 that are now served by common carriers, (excluding street railways), and the name of each common carrier serving the several places.

Answer. The City of Cleveland is served by the lines of the applicant, of the Baltimore & Ohio Railroad Company, the Erie, the Big Four, the New York Central Railroad

Company, the New York, Chicago and St. Louis Railroad Company and the Pennsylvania Railroad Company, and by the following interurban electric railroads: The Northern Ohio Power & Light Company, The Lake Shore Electric Railway Company, and The Cleveland, Southwestern Railway & Light Company.

Question 12. The names of the places mentioned in paragraph 10 that have no common carrier service, giving the distance in miles of each such place from the nearest station on a common carrier, together with the name of each such carrier, and the character of the connecting highway.

Answer. This question is not applicable.

Question 13. The name and population of each city, town and village (together with state and county in which located), having a population of 200 or more and lying within 10 miles of the proposed new line of railroad, but not entered thereby.

Answer. This question is not applicable.

Question 14. The approximate distance in miles by highway from the nearest station on the proposed new line of [fol. 224] railroad to each of the places enumerated in paragraph 13, and the names of all common carriers, if any, now serving each.

Answer. This question is not applicable.

Question 15. The names of other common carriers with which the proposed new line of railroad will connect, and the proposed points of track connection.

Answer. This question is not applicable.

Question 16. The general topography of the country through which the proposed new line of railroad will extend, indicating whether level, rolling, mountainous, cultivated, pasture, prairie, desert, rocky, timbered, or underlaid with minerals.

Answer. The general topography of the land through which extend the lines of railroad proposed to be operated by the applicant temporarily is level, being for the most part in the floor of the valley of the Cuyahoga River. The portion of the tracks of the Terminals proposed to be operated for and on behalf of the applicant will be constructed upon the side of a hill along the eastern edge of the Cuya-

hoga Valley, but at a uniform grade, about level 52, city datum.

Question 17. The approximate area of the territory to be served, an estimate of the population therein, and of the area, (1) in timber, (2) in pasture, and (3) under cultivation.

Answer. This question is not applicable.

Question 18. The kinds of industry carried on in the area to be served, such for example, as farming, dairying, grazing, coal mining, manufacturing, lumbering, etc., and the relative importance of each.

Answer. This question is not applicable.

Question 19. The main facts as to the age, growth and extent of such industries, their probable future growth and permanence and the reasons therefor.

Answer. This question is not applicable.

[fol. 225] Question 20. What carriers now serve these industries, and to what extent.

Answer. This question is not applicable.

Question 21. Whether the chief support of the proposed new line of railroad will come from the general community or from some particular industry or industries, located or to be located. In the latter case give facts concerning such particular industry or industries and applicant's contractual or financial relation thereto.

Answer. The Chief support of the operation by or for the applicant of the tracks and station facilities described in the application will come from the general community.

Question 22. Whether the proposed new line of railroad will be built primarily for a direct profit from railway operation, or for the advantage of any other industry or business. If for the latter, state what industry or business will be so benefited, what such advantages will be, and the applicant's contractual or financial relation to such industry or business.

Answer. The proposed operation will be conducted primarily for a direct profit from railway operation.

Question 23. If the proposed new line of railroad is an extension of an existing railroad, branch, connecting track or cutoff, in so far as not fully set forth under paragraphs 21 and 22, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to

be justified by its effect on the business of the existing line.

Answer. It is estimated by the applicant that the rental of $20,000 per annum to be paid for the passenger station facilities and service to be furnished in the union depot of the Terminals will be substantially less than the probable cost to the applicant of carrying charges on the lands, and carrying charges, depreciation, maintenance and operation of the buildings, tracks and equipment, necessary to provide the applicant with adequate station facilities in lieu of its [fol. 226] present Ontario Street passenger station. The operation on behalf of the applicant of the passenger station facilities of the Terminals will further be justified by their probable effect on the business of the existing lines of the applicant; as it will enable the applicant to utilize the excellent union depot facilities of the Terminals for a period of 100 years from the date of completion thereof, and thus will provide passenger station facilities and service for the patrons of the applicant far superior to those which the applicant now provides at its Ontario Street passenger station. In the opinion of the applicant this will tend to retain to the applicant a part of its passenger traffic into and out of Cleveland which otherwise may be lost to it.

Question 24. If the proposed new line of railroad is to be a connecting link between existing railroads, the kind and volume of traffic, expresed in tons or carloads, that probably will be interchanged.

Answer. The proposed operation and acquisition will effect a connecting link between the lines of the applicant and those of other carriers using the union depot of the Terminals, all of the benefit and convenience of which will accrue to passenger and allied services.

Question 25. What economies will be effected by such interchange of traffic.

Answer. See answer to question 23.

Question 26. Of the interchange traffic mentioned [illegible] answer to paragraph 24, what part, expressed in tons or carloads, cannot be hauled or moved between common points by existing railroads.

Answer. This question is not applicable.

Question 27. The facts as to any agreement, tentative or otherwise, with existing carriers, covering operation of the proposed line, interchange of traffic, division of rates, or trackage rights.

[fol. 227] Answer. The only agreements of this character are attached to the application as Exhibits 2 and 3.

Question 28. Whether any aid, gift, grant of right of way, or other donation has been promised in connection with the proposed new line of railroad, and if so, the names of all persons, natural or artificial, giving such aid, gift, grant of right of way, or other donation, with a statement of the nature and value thereof.

Answer. No aids, gifts, grants of right of way, or other donations have been promised in connection with the operation of the said tracks or lines of railroad by the applicant, excepting the reimbursement to be made the applicant by the Terminals as provided in the agreements between the applicant and the Terminals, attached to the application as Exhibits 2 and 3 (Part 3).

Question 29. The manner in which it is proposed to finance construction and equipment, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available, and which, if any, of such securities will be underwritten by industries to be served by the proposed line.

Answer. This question is not applicable.

Question 30. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years following the completion of the proposed new line of railroad, together with an estimate of the annual revenues expected after the first five years. The detailed estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue to be derived. Chief points or territories of origin and chief points or territories of destination of traffic.

Answer. This question is not applicable.

[fol. 228] Question 31. The estimated total gross revenue, operating expenses, net revenue and net railway operating income, corresponding with the estimates of traffic under paragraph 30. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

Answer. This question is not applicable.

Question 32. The part of the estimated traffic which will constitute net additional business developed or created by the construction of the proposed new line of railroad, and the part that will be diverted from existing railroads.

Answer. It is not expected that the operation for and on behalf of the applicant of the union depot facilities of the Terminals will develop or create additional business or will divert any substantial amount of traffic from existing railroads; but that it will retain for the applicant some passenger business which may otherwise be lost to it.

Question 33. The particular mining, timbering, manufacturing or other enterprises to be established contingent on the construction of the proposed new line of railroad and applicant's contractual or financial relation thereto. The tonnage or number of cars of freight expected from such enterprise.

Answer. This question is not applicable.

Question 34. The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

Answer. The tracks necessary for the operation into the Superior Avenue station of the Erie are already constructed. Construction of the union depot of the Terminals began in the year 1922, and it is expected that it will be completed about January 1, 1930. None of the tracks over which the trains of the applicant will be operated into the union depot of the Terminals have been constructed but it is expected they will be installed and will be ready for operation on or before January 1, 1930.

[fol. 229] Question 35. The engineering work in full detail which has been done with respect to the proposed line at the time of filing the return.

Answer. The tracks to be operated temporarily by the applicant have already been constructed. The proposed connecting track (with passing siding) to be operated by the applicant for a period of 100 years has not been constructed; nor has its location been definitely fixed. The tracks over which the trains of the applicant will be operated into the union depot of the Terminals have not been constructed and cannot be constructed until the applicant is authorized to abandon its right of way for common carrier service north of Eagle Avenue. The station roadbed

of the Terminals has been graded and the station building work is well advanced at the present time.

Question 36. The following particulars as to the physical characteristics of the proposed new line of railroad.

(a) The number of main line tracks.

(b) Weight of rail for main line track.

(c) Rate of maximum grade in each direction, and whether and how compensated for curvature.

(d) Rate of limiting grade that will fix train loading in each direction, and whether and how compensated for curvature.

(e) If helper grades are to be used, the number, rate, length and location of each.

(f) The maximum rate of curve.

(g) The average amount of curvature per mile, in degrees.

(h) The approximate length and height of wooden trestles or other temporary construction.

Answer.

Tracks to be operated temporarily:

(a) All of the tracks set forth in the table on page 5 of the applicant are to be used temporarily in main line operation, although only two of said tracks (the eastward main [fol. 230] track and the westward main track of the Big Four) are now known as main tracks.

(b) The weights of rail for the tracks to be operated in main line passenger service are as follows:

Tracks of the applicant and of the Big Four, 90 pounds per yard; tracks of the Erie, 100 pounds per yard.

(c) The rate of maximum grade in each direction of these tracks is as follows:

Track of the applicant: westerly direction, + 1.14%, no compensation; easterly direction, + .4%, no compensation.

Tracks of the Erie: westerly direction, + 1.51%; easterly direction, + 1.09%; compensation on basis of .04% per degree of single angle.

Tracks of the Big Four: northerly direction, + .41%; southerly direction, + 1.053%; not compensated.

(d) The rates of the limiting grades that will fix train loading in each direction are as follows:

Track of the applicant: westerly direction, + 1.14%; easterly direction, + .4%; not compensated.

Tracks of the Erie: westerly direction, + 1.51%; easterly direction, + 1.09%; compensation, .04% per degree of double angle.

Tracks of the Big Four: northerly direction, + .41%; southerly direction, + 1.053%; not compensated.

(e) No helper grades are to be used.

(f) The maximum rates of curve of these tracks are as follows:

Track of the applicant, 16 degrees.

Tracks of the Erie, 9 degrees, 30 minutes.

Tracks of the Big Four, 5 degrees, 15 minutes.

(g) The average amount of curvature per mile, in degrees is as follows:

Track of the applicant, 590.9 degrees.

[fol. 231] Tracks of the Erie, 153 degrees.

Tracks of the Big Four, 61 degrees, 58 minutes.

(h) There are no wooden trestles or other temporary construction.

Tracks to be operated for a period of 100 years:

The above questions do not appear to be applicable to the terminal tracks to be operated by or on behalf of the applicant for a period of 100 years.

Question 37. An estimate of total increase in charges to road and equipment account during the first five (5) years after completion of the line. If this displaces rental charges on equipment, so show.

Answer. There will be increase in the charges to road and equipment account during the first five years of operations as described in the application.

Question 38. Any additional facts or reasons to show that the public convenience and necessity require the construction of the proposed line.

Answer. In the opinion of the applicant the convenience of the traveling public using its lines will be greatly facilitated by its entrance into the new union depot, as described in the application, for the reason that passengers may thereby be enabled to make direct connections with the steam railroads and rapid transit line proposing to use the union depot of the Terminals. These lines of railroad are as follows:

Steam railroads: The Cleveland, Cincinnati, Chicago and Saint Louis Railway, the New York Central Railroad, the New York, Chicago and St. Louis Railroad, and possibly the Erie Railroad and the Baltimore & Ohio Railroad.

Rapid transit line: The Cleveland Interurban Railroad, which serves the Shaker Heights section of the Cleveland Metropolitan area and is projected easterly thereof.

[fol. 232] The union depot of the Terminals will be located adjacent to the Public Square giving ready access to the street car lines operated by The Cleveland Railway Company, most of which loop through the Public Square.

The temporary operation of the tracks of the Big Four and of the tracks and station facilities of the Erie is necessary to enable the Terminals to utilize the right-of-way of the applicant now situated northerly of Eagle Avenue (provided authority is granted by the Commission for the abandonment thereof) for the construction of tracks and facilities constituting the east approach of its union depot.

The Wheeling and Lake Erie Railway Company, by
(Signed) Geo. Durham, Vice-President and General Manager.

[fol. 233] STATEMENT RE EXHIBITS TO RETURN BY WHEELING CO.

The following exhibits are attached hereto and made parts hereof:

Exhibit 1. A copy of a profile of the tracks to be operated temporarily by the applicant in order to reach the Superior Avenue station of the Erie. (In view of the fact that the location of the connecting track and passing siding intervening between the main line of the applicant and the tracks of the Terminals has not been definitely fixed it is not practicable to furnish a profile of the tracks proposed to be operated by or on behalf of the applicant for a period of 100 years.)

Exhibit 2. Copies of applicant's income account for the calendar years 1923 to 1927, both inclusive, and for the months of January to October, inclusive, of the year 1928; also copies of the profit and loss account and general balance sheet of the applicant as of October 31, 1928.

Exhibit 3. Opinion of counsel that the proposed operation by and/or on behalf of the applicant is within its charter powers.

The following exhibits referred to in Questionnaire No. 1 forwarded to the applicant in this proceeding are not attached for the reasons stated below:

(a) A copy of the engineering report of reconnaissance.

This report is not submitted as the tracks to be operated temporarily are already constructed and the requirement does not seem to apply to the Terminals tracks proposed to be operated for the period of 100 years.

(b) Specifications as to construction.

This exhibit is omitted for the reasons stated under (a), supra.

(c) A map of actual staked or projected location.

In the opinion of the applicant this requirement is met by the map which is attached as Exhibit 1 to the application filed herein, when taken in conjunction with the maps [fol. 234] of the tracks of the Erie and Big Four proposed to be operated by the applicant which are attached to Parts 1 and 2 of Exhibit 3 to the application.

(e) Detailed estimates of the costs of constructing the line of railroad to be operated and detailed estimates of the kind and cost of the equipment required to handle the estimated traffic.

These estimates do not appear applicable to the operation of the tracks as described in the application, as the tracks which the applicant proposed to operate temporarily are already in existence, and will be operated with applicant's existing equipment; and the tracks to be built by the Terminals are authorized under the Certificate of Public Convenience and Necessity issued to the Terminals in 70 I. C. C. 659, 671.

State of Ohio,
County of Cuyahoga, ss:

George Durham makes oath and says that he is the Vice President and General Manager of The Wheeling and Lake Erie Railway Company, applicant herein; that he has been authorized by proper corporate action on the part of said applicant to verify and file with the Interstate Commerce

Commission the foregoing return to questionnaire of said Commission in respect of the application in Finance Docket No. 7298; that he has carefully examined all of the statements referred to in said return and the exhibits attached thereto and made a part hereof; that he has knowledge of the matters set forth in such return and that all such statements made and the matters set forth therein are true and correct to the best of his knowledge, information and belief.

(Signed) Geo. Durham.

Subscribed and sworn to before me a Notary Public in and for the State and County above named, this 29th day of December, 1928. (Signed) John A. McCort. My commission expires July 28, 1930.

[fols. 235 & 236] Proofs of Publication

Notice

The Wheeling and Lake Erie Railway Company hereby gives notice that on the 8th day of December, 1928, it filed with the Interstate Commerce Commission at Washington, D. C., its application for a certificate that the present and future public convenience and necessity require (a) the operation by it over a proposed connecting track of the Cleveland Union Terminals Company, approximately 950 feet long; (b) to acquire the use of the passenger station facilities of said Cleveland Union Terminals Company; (c) to operate a portion of the industrial side track owned by the applicant extending from a connection with its main line near Mahoning Avenue to a connection with an interchange track of the Erie Railroad Company 612 feet; (d) to operate over an interchange track of the Erie Railroad Company extending from a connection described in (c) to a connection with a connecting track of the Erie 2093 feet; (e) to operate over a connecting track of the Erie from said connection to a connection with the eastward main track of the Cleveland, Cincinnati, Chicago & St. Louis Railway 1824 feet, and over two passenger terminal tracks and cross-over of said Erie Railroad Company having an aggregate length of 1446 feet; (f) to use the passenger station facilities of the Erie at its Superior Avenue Station; (g) to operate over the tracks of the Cleveland, Cincinnati, Chicago & St.

Louis Railway Company for a distance of 6744 feet, all in the City of Cleveland, Cuyahoga County, Ohio.

The Wheeling and Lake Erie Railway Company.

STATE OF OHIO,
Cuyahoga County, ss:

I, M. Jarvis, being duly sworn, do, upon my oath, depose and say that I am bookkeeper of the Cleveland Plain Dealer, a newspaper printed in said county, and in general circulation therein, and that the annexed advertisement was published in said newspaper December 10th-17th and 24th, 1928.

(Signed) M. Jarvis.

Sworn to and subscribed before me, this 24th day of December A. D. 1928. (Signed) U. W. Hird, Notary Public. (Seal.)

THE STATE OF OHIO,
Cuyahoga County, ss:

I, A. H. Bente, being duly sworn, do, upon my oath, depose and say that the annexed advertisement was published in The Cleveland Press, a newspaper printed in said County of Cuyahoga, and having a general circulation therein, for the period of (3) consecutive weeks, same day each week, from and after the 10th day of December A. D. 1928, the first publication having been made on the said 10th day of December A. D. 1928, and the last on the 24th day of December A. D. 1928.

(Signed) A. H. Bente.

Sworn to before me and subscribed in my presence by the said A. H. Bente this 26th day of December A. D. 1928. (Signed) Geo. B. Hart, Notary Public. (Seal.)

THE STATE OF OHIO,
Cuyahoga County, ss:

L. E. Smith being duly sworn, says that he is Clerk for the publishers of The Cleveland News, a public Newspaper printed, published, and of general circulation in said County; and that the advertisement hereunto attached was

published in said Newspaper on the following days, December 10, 17 and 24, 1928.

(Signed) L. E. Smith.

Sworn to and subscribed before me this 24th day of December, 1928. (Signed) P. L. Emery, Notary Public for said County. (Seal.)

(Here follows Exhibit 2 to Return, side folio 237)

[fol. 238] Exhibit 2, Part 2

The Wheeling and Lake Erie Railway Company

Profit and Loss Balance as of October 31, 1928

	Debit	Credit
Credit balance at beginning of year	$	$15,011,261.24
Credit balance transferred from Income	.....	3,706,358.68
(603) Profit on Road and Equipment Sold (adjustment)	36.30	.....
(606) Donations	.....	5,359.02
(607) Miscellaneous Credits	.....	23.93
(614) Dividend Appropriations of Surplus	831,782.00	.....
(619) Loss on retired road and equipment	10,599.05	.....
(621) Miscellaneous Debit	6,574.63	.....
Credit balance carried to Balance Sheet	17,874,010.89	.....
Total	$18,723,002.87	$18,723,002.87

[fol. 237]

EXHI

The Whee

Income Account for Calendar Years 1923

		Ten m Octot
	I. Operating Income.	
(501)	Railway operating revenues	$17,4
(531)	Railway operating expenses	11,6
	Net revenue from railway operations	5,8
(532)	Railway tax accruals	1,4
(533)	Uncollectible railway revenues	
	Total operating income	4,3
	II. Nonoperating Income.	
(503)	Hire of freight cars—Credit balance	
(504)	Rent from locomotives	
(505)	Rent from passenger-train cars	
(507)	Rent from work equipment	
(508)	Joint facility rent income	
(509)	Income from lease of road	
(510)	Miscellaneous rent income	
(511)	Miscellaneous nonoperating physical property	
(514)	Income from funded securities	
(515)	Income from unfunded securities and accounts	
(519)	Miscellaneaous income	
	Total nonoperating income	
	Gross income	4,
	III. Deductions from Gross Income.	
(536)	Hire of freight cars—Debit balance	1
(537)	Rent for locomotives	
(538)	Rent for passenger-train cars	
(540)	Rent for work equipment	
(541)	Joint facility rents	
(543)	Miscellaneous rents	
(544)	Miscellaneous tax accruals	
(546)	Interest on funded debt	
(547)	Interest on unfunded debt	
(548)	Amortization of discount on funded debt	
(551)	Miscellaneous income charges	
	Total deductions from gross income	1,
	Net income	3,

EXHIBIT 2 TO RETURN BY WHEELING CO.

Part 1

The Wheeling and Lake Erie Railway Company

ome Account for Calendar Years 1923 to 1927, Inclusive, and for the First Ten Months of 1928

	Ten months ended October 31, 1928	Year ended December 31, 1927	Year ended December 31, 1926	Year ended December 31, 1925	Year ended December 31, 1924	Year ended December 31, 1923
ing Income.						
g revenues	$17,443,126.99	$18,129,586.49	$20,925,898.61	$20,395,618.51	$18,332,401.28	$19,211,572.21
g expenses	11,636,974.38	13,716,570.94	14,984,088.86	14,400,989.98	14,410,272.76	14,753,041.15
rom railway operations	5,806,152.61	4,413,015.55	5,941,809.75	5,994,628.53	3,922,128.52	4,458,531.06
uals	1,480,731.66	1,462,570.89	1,664,998.00	1,568,458.00	1,255,606.00	1,327,311.00
way revenues	2,182.45	1,675.61	3,651.51	4,108.19	4,731.88	1,005.87
ing income	4,323,238.50	2,948,769.05	4,273,160.24	4,422,062.34	2,661,790.64	3,130,214.19
erating Income.						
ars—Credit balance	.....	29,986.46	109,162.35	.....	.....	.....
otives	61,699.75	72,085.95	62,287.46	52,140.42	43,618.75	36,045.17
ger-train cars	165.60	316.60	124.40	197.60	73.00	.....
equipment	7,122.25	6,380.72	10,483.39	8,712.40	7,215.27	10,429.43
income	77,470.97	95,920.53	60,603.89	46,174.36	41,236.17	40,101.42
e of road	5,000.00	6,000.00	6,000.00	6,000.00	6,000.00	6,000.00
t income	23,258.49	23,307.59	24,785.72	22,610.74	19,392.42	19,509.46
operating physical property	.....	.....	.....	9.60	9.60	.....
ded securities	84,406.28	102,354.84	104,766.25	103,291.25	100,278.75	100,278.75
nded securities and accounts	142,323.79	120,593.24	155,056.22	105,611.35	78,319.57	45,793.60
come	3,458.69	3,702.83	7,558.43	4,408.54	5,637.02	204,630.70
rating income	404,905.82	460,648.76	540,828.11	349,156.26	301,780.55	462,788.53
me	4,728,144.32	3,409,417.81	4,813,988.35	4,771,218.60	2,963,571.19	3,593,002.72
ctions from Gross Income.						
ars—Debit balance	164,162.81	.....	.....	46,073.33	294,944.34	371,118.22
ves	23,949.78	15,168.35	15,129.26	13,267.41	12,321.55	59,899.77
r-train cars	100.80	199.96	107.00	113.72	530.88	290.46
ipment	44.19	118.29	145.29	221.12	183.48	31.54
s	77,589.83	89,952.82	101,563.46	104,639.77	84,464.85	76,209.47
ts	6,015.40	291.70	192.70	164.50	742.20	1,529.18
accruals	.....	.....	.....	.....	.....	.....
d debt	704,858.17	878,102.50	1,137,177.53	1,278,881.33	1,254,246.67	1,303,701.56
ded debt	38,357.37	19,119.39	25,022.08	22,757.08	21,653.15	21,879.50
count on funded debt	3,857.29	8,309.15	23,621.35	14,636.64	11,740.44	11,740.44
me charges	2,850.00	3,322.18	3,675.00	4,185.00	.....	.....
ns from gross income	1,021,785.64	1,014,584.34	1,306,633.67	1,484,939.90	1,680,827.56	1,846,400.14
	3,706,358.68	2,394,833.47	3,507,354.68	3,286,278.70	1,282,743.63	1,746,602.58

[fol. 239] Exhibit 2, Part 3

The Wheeling and Lake Erie Railway Company General Balance Sheet

Assets

Item	Balance at close of Oct. 31, 1928
Investments:	
(701) Investment in Road and Equipment	$89,496,039.91
(704) Deposits in Lieu of Mortgaged Property Sold	45,954.00
(706) Investment in Affiliated Companies:	
(a) Stocks	1,030,469.07
(b) Bonds	2,224,000.00
(c) Advances	447,362.21
(707) Other Investments:	
(a) Stocks	372.33
(b) Bonds	2,500.00
Total Investments	$93,246,697.52
Current Assets:	
(708) Cash	$6,433,767.02
(710) Time Drafts and Deposits	
(711) Special Deposits	2,079,538.19
(713) Traffic & Car Service Balance —Receivable	269,361.33
(714) Net Balance Receivable from Agents and Conductors	115,030.02
(715) Miscellaneous Accounts Receivable	387,902.66
(716) Material and Supplies	1,018,171.62
(717) Interest and Dividends Receivable	34,365.95
(719) Other Current Assets	15,435.74
Total Current Assets	$10,353,572.53
[fol. 240]	
Deferred Assets:	
(720) Working Fund Advances	$7,522.51
Unadjusted Debits:	

Item	Balance at close of Oct. 31, 1928
(723) Rents and Insurance Paid in Advance	$21,847.97
(725) Discount on Funded Debt	60,050.42
(727) Other Unadjusted Debits	7,335,298.84
(728) Securities Issued or Assumed—Unpledged ($8,959,000.00)	
(729) Securities Issued or Assumed—Pledged ($9,358,000.00)	
Total Unadjusted Debits	$7,417,197.23
Grand Total	$111,024,989.70

Liabilities

Item	Balance at close of Oct. 31, 1928
Stock:	
(751) Capital Stock	$55,868,858.00
Long Term Debt:	
(755) Funded Debt Unmatured:	
(a) Book Liability $43,910,800.00	
(b) Held by Respondent 18,317,000.00	$25,593,800.00
Current Liabilities:	
(759) Traffic & Car Service Balance—Payable	$40,973.29
(760) Audited Accounts & Wages Payable	2,319,230.65
(761) Miscellaneous Accounts Payable	47,950.98
(762) Interest Matured Unpaid	10,110.00
(763) Dividends Matured Unpaid	21.00
(766) Unmatured Interest Accrued	174,152.08
[fol. 241]	
(768) Other Current Liabilities	129,939.40
Total Current Liabilities	$2,722,377.40
Other Deferred Liabilities:	
(770) Other Deferred Liabilities	$386,209.11

Unadjusted Credits:	
(771) Tax Liabilities	$1,516,974.33
(776) Accrued Depreciation—Equipment	4,956,793.06
(778) Other Unadjusted Credits	528,928.03
Total Unadjusted Credits	$7,002,695.42
Corporate Surplus:	
(779) Addition to Property through Income and Surplus	$1,387,038.97
(780) Funded Debt Retired through Income and Surplus	190,000.00
(784) Profit and Loss—Balance	17,874,010.89
Total Corporate Surplus	$19,451,049.86
Grand Total	$111,024,989.79

[fol. 242] EXHIBIT 3 TO RETURN BY WHEELING CO.

Cleveland, Ohio, December 29, 1928.

The Interstate Commerce Commission, Washington, D. C.

DEAR SIRS: As General Counsel for The Wheeling and Lake Erie Railway Company (hereinafter referred to as the "Company") we are familiar with the provisions of the Articles of Incorporation and the Regulations of the Company and with the powers of the Company and of its authorized agents.

We have examined the resolutions adopted by the Board of Directors of the Company on July 20, 1928, and November 23, 1928, pursuant to which the Company has filed with the Interstate Commerce Commission in its Finance Docket No. 7298 an application for authority (a) to operate in passenger and allied services, for a period of 100 years, a proposed connecting track and passing siding of The Cleveland Union Terminals Company; (b) to acquire, for a period of 100 years, passenger station facilities and service in the new union depot of The Cleveland Union Terminals Company; and (c) to operate, temporarily, a portion of an

industrial siding track of the applicant, tracks and station facilities of the Erie Railroad Company and tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, all in the City of Cleveland, Ohio. In our opinion the proposed operation of tracks and station facilities and the proposed acquisition of passenger station facilities and service are within the charter powers of the Company.

Your respectfully, (Signed) Squire, Sanders & Dempsey, General Counsel for the Wheeling and Lake Erie Railway Company.

[fols. 243-245] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7299

APPLICATION OF THE WHEELING AND LAKE ERIE RAILWAY COMPANY, UNDER PARAGRAPHS 18 TO 20, INCLUSIVE, OF SECTION 1 OF THE INTERSTATE COMMERCE ACT FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZING IT TO ABANDON A PORTION OF ITS LINE OF RAILROAD, INCLUDING ITS ONTARIO STREET PASSENGER STATION, IN THE CITY OF CLEVELAND, OHIO

To the Interstate Commerce Commission:

The Wheeling and Lake Erie Railway Company, hereinafter referred to as the "applicant," pursuant to the provisions of paragraphs 18 to 20, inclusive, of Section 1 of the Interstate Commerce Act hereby applies for a certificate of public convenience and necessity authorizing it to abandon a portion of its line of railroad, including its Ontario Street passenger station, in the City of Cleveland, Ohio; and for cause shows:

(a) The exact corporate name of the applicant is The Wheeling and Lake Erie Railway Company.

(b) It is a common carrier by railroad subject to the Interstate Commerce Act.

[fol. 246] (c) The applicant proposes to abandon that portion of its line of railroad extending northerly from the northerly line of Eagle Avenue a distance of 1,035 feet to

the northerly terminus of applicant's line of railroad in the City of Cleveland, Cuyahoga County, Ohio, together with its Ontario Street passenger station which is located on the portion of its line of railroad sought to be abandoned. Said Ontario Street passenger station is the principal and down town passenger station of the applicant in the City of Cleveland, Ohio.

(d) Applicant proposes to abandon that portion of its property described in paragraph (c) supra, as well as the operation thereof.

(e) Applicant's line is not in receivership.

(f) The abandonment of the portion of applicant's railroad above described, including its Ontario Street passenger station, should be authorized for the following reasons:

Applicant's Ontario Street passenger station is located on the southwesterly side of Ontario Street near its intersection with Huron Road. The station building is of wood and stucco construction built in 1909 (during the receivership of the property) under a temporary permit granted for one year by the City of Cleveland, Ohio. This building is approaching the end of its structural life, and in the interest of safety of the public and the applicant's employes, in the near future it will be necessary to replace it or to secure passenger station facilities and service elsewhere in the vicinity.

By virtue of the terms of an agreement entered into between The Cleveland Union Terminals Company (hereinafter referred to as the "Terminals") and the applicant (subject to the approval and authorization of the Interstate Commerce Commission, if required by law), the Terminals has agreed to provide the applicant with passenger station facilities and service in the union depot of the Terminals now under construction at Cleveland, Ohio, for a term of 25 years, renewable (at the option of the applicant) for a like period, and thereafter renewable (at the option of the applicant) for a further period of 50 years, at certain rentals and upon certain terms and conditions hereinafter more particularly described; and pending the completion of said [fol. 247] union depot and/or the beginning of the furnish-

ing of such facilities and service therein, to furnish passenger station facilities and service to the applicant at the Superior Avenue station of the Erie Railroad Company (hereinafter referred to as the "Erie") in the City of Cleveland, Ohio, free of cost to the applicant.

The compensation to be paid by the applicant for such passenger station facilities and service in the union depot of the Terminals for the first term of 25 years is at the rate of $20,000 per annum for a normal number of 3,000 trains containing in the aggregate not more than 14,000 cars to or from said union depot from points of origin or to points of destination on the present lines of the applicant and moving over the same, or to or from Pittsburgh or Connellsville or points between Pittsburgh or Connellsville and the present lines of the applicant, on lines constructed, acquired, controlled or operated by the applicant extending from Pittsburgh or Connellsville, or points westerly thereof, to a connection or connections with the present lines of the applicant at Jewett, Ohio, or points southerly or easterly thereof and moving over applicant's lines; such rental to be increased for any year in the proportion by which the number of such trains exceeds 3,000 and/or the number of such cars exceeds 14,000 in said year. The applicant's trains may also include cars from points of origin or to points of destination on extensions of or on lines connecting with the present lines of the applicant other than Pittsburgh and Connellsville and points westerly thereof, which cars handled into or through the union depot will be paid for upon the same per car basis from time to time as cars handled into or through the union depot for the account of the proprietary railroad companies. The rental is to be upon the same basis for the second term of 25 years, subject to an increase to the extent, if any, which may be justified by the increase in operating costs directly attributable to the service rendered by the Terminals for the applicant. For the final renewal period of 50 years, the applicant may acquire the right of joint use and occupancy of the union depot of the Terminals upon such terms and conditions as may be mutually agreed upon, or in the event of failure to agree, as may be determined by arbitration.

[fol. 248] The Terminals will reimburse the applicant for all rental or other compensation which the applicant must

pay in the first instance to the Erie for the right of joint operation of the Erie tracks and station facilities and to The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company (hereinafter referred to as the "Big Four") for the right of joint operation of the Big Four tracks to enable the applicant to reach the Superior Avenue station of the Erie, all as provided generally in said agreement between the applicant and the Terminals, and specifically in an agreement between the applicant and the Erie, in an agreement between the applicant and the Big Four, and in an additional agreement between the applicant and the Terminals, (all subject to the approval and authorization of the Interstate Commerce Commission, if required by law).

The Terminals will also bear all the cost and expenses of the construction, rearrangement, maintenance and removal of tracks and the acquisition of property necessary therefor.

It is estimated by the applicant that the rental of $20,000 per annum to be paid for the passenger station facilities and service to be furnished it in the union depot of the Terminals will be substantially less than the probable cost to the applicant of carrying charges on the lands, and carrying charges, depreciation, maintenance and operation of the buildings, tracks and equipment, necessary to provide the applicant with adequate passenger station facilities in lieu of its present Ontario Street passenger station; and that the acceptance of said facilities and service in said union depot and the acceptance of temporary facilities and service in said Superior Avenue Station will be to its best interest and the best interest of the traveling public which it serves, and will enable the applicant to render to the traveling public a more efficient service than it can render in its present Ontario Street passenger station or in any station which it might, at a reasonable cost, build in substitution thereof.

The applicant has filed or is about to file with the Interstate Commerce Commission an application for authority (a) to operate in passenger and allied services, for a period of 100 years, a proposed track (and passing siding) of the Terminals, connecting the tracks of the applicant with the [fol. 249] tracks entering or appurtenant to the new union

depot of the Terminals; (b) to acquire, for a period of 100 years, passenger station facilities and service in said new union depot of the Terminals, requiring the operation and use of tracks in and appurtenant to said union depot for and on behalf of the applicant; and (c) to operate in passenger and allied services, temporarily, a portion of an industrial siding track of the applicant, tracks and station facilities of the Erie, and tracks of the Big Four, all in the City of Cleveland, Ohio. A copy of the agreement between the applicant and the Terminals providing for the furnishing to the applicant of passenger station facilities and service in the union depot of the Terminals is attached to said application as Exhibit 2; and copies of the agreement between the applicant and the Erie, of the agreement between the applicant and the Big Four, and of the additional agreement between the applicant and the Terminals are attached to said application as Exhibit 3; all of which agreements are incorporated herein by reference as fully as though set forth in full as a part of this application.

That portion of applicant's main line of railroad lying northerly of the northerly line of Eagle Avenue in the City of Cleveland, Ohio, is now, and for some time past has been, used for the sole purpose of reaching applicant's Ontario Street passenger station. Formerly this portion of applicant's line of railroad was also used to serve a few shippers situated between Eagle Avenue and the applicant's Ontario Street passenger station, but these shippers have moved from this vicinity and the lands formerly occupied by them have been acquired by the Terminals or its affiliated corporations in connection with the union depot development. If, as and when when the applicant's Ontario Street station is abandoned, the portion of its line of railroad lying northerly of Eagle Avenue will not be required by the applicant for common carrier service.

Applicant has secured an option from The Cleveland Terminals Building Company giving to the applicant the right for a period of five years to require the Building Company upon ten days' notice to pay to the applicant the sum of $1,600,000 in consideration for the conveyance by the [fol. 250] applicant to the Building Company of the lands owned by the applicant situate northerly of Eagle Avenue in the City of Cleveland, Ohio, (with all reversionary rights

incident thereto), and for the assignment by the applicant to the Building Company of a leasehold interest in certain adjoining lands; which sum is not less than the reasonable market value of said lands, reversionary rights and leasehold interest.

(g) Correspondence in regard to this application should be addressed to Squire, Sanders & Dempsey, General Counsel of the applicant, 1857 Union Trust Building, Cleveland, Ohio.

(h) Applicant was incorporated December 14, 1916 under the laws of the State of Ohio and was organized under the laws of that state. It operates lines of railroad in the State of Ohio by virtue of the provisions of its charter.

(i) The making of this application was authorized by resolutions adopted by the Board of Directors of the applicant at its meetings of July 20, 1928 at Cleveland, Ohio and November 23, 1928 at New York City.

(j) Applicant desires a hearing upon this application.

Attached hereto, marned Exhibit 1, and made a part hereof, is a map drawn to scale (1 inch equals about 385 feet) showing the location and geographical situation of the portion of applicant's line of railroad and of applicant's Ontario Street passenger station sought to be abandoned and their relation to existing railroad lines and other geographical facts pertinent to a consideration of the case.

Wherefore applicant prays that it may be authorized to abandon that portion of its line of railroad lying northerly of the northerly line of Eagle Avenue, including its Ontario Street passenger station, all in the City of Cleveland, Ohio.

The Wheeling and Lake Erie Railway Company,
(Signed) By Geo. Durham, Vice-President and General Manager.

[fols. 251 & 252] STATE OF OHIO,
Cuyahoga County, ss:

George Durham makes oath and says that he is the Vice President and General Manager of The Wheeling and Lake Erie Railway Company; that he has examined each and all

of the statements made in the foregoing application; that they are true and correct to the best of his knowledge and belief; that he declares and believes that the granting of a certificate of convenience and necessity to the applicant as prayed for in the foregoing application is necessary to enable the applicant properly to meet the transportation needs of the public; and that the foregoing application is verified and filed with the approval and at the direction of the applicant's Board of Directors by virtue of resolutions adopted at meetings duly held at Cleveland, Ohio, on the 20th day of July, 1928 and in the City of New York on the 23rd day of November, 1928, and that he has been authorized by the Board of Directors to ex-cute any and all papers and to do any and all things which may be required in connection with the foregoing application.

(Signed) Geo. Durham.

Sworn to and subscribed before me, a Notary Public in and for said county and state, this 7th day of December, 1928. (Signed) John A. McCort, Notary Public. My commission expires July 28, 1930. (Seal.)

Exhibit No. 1 to foregoing application omitted in printing as it is the same as original exhibit 31 on file with the Clerk.

[fols. 253-255] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7299

In the Matter of the Application of THE WHEELING AND LAKE ERIE RAILWAY COMPANY, under paragraphs 18 to 20, Inclusive, of Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity Authorizing it to Abandon a Portion of Its Line of Railroad, Including Its Ontario Street Passenger Station in the City of Cleveland, Ohio

RETURN TO QUESTIONNAIRE

The Wheeling and Lake Erie Railway Company, having made application to the Interstate Commerce Commission, under paragraph (18) of Section 1 of the Interstate Commerce Act, as amended, for a certificate of public convenience and necessity authorizing it to abandon a portion of its line of railroad, including its Ontario Street passenger station, in the City of Cleveland, Ohio, which application is filed in the office of the Commission in Finance Docket No. 7299, hereby affirms that the notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, beginning on December 10, 1928 in The Cleveland Plain Dealer, The Cleveland News and The Cleveland Press, which are newspapers of general circulation in the City of Cleveland, and in Cuyahoga County, Ohio. Cuyahoga County, [fol. 256] Ohio, is the only county in which the line of railroad and passenger station proposed to be abandoned are located; and the identified newspaper clippings hereto attached contain true copies of the notices as published in said newspapers.

The applicant also submits the following information required by the Commission:

Question 1. When the line in question was constructed, for what purpose or purposes, and its history as an operating unit from the time of construction up to the date of this return.

Answer. The portion of the line of railroad proposed to be abandoned was constructed by The Connotton Valley Railway Company, a predecessor of the applicant, in the year 1883 to enable that company to construct a terminal on or near the site of the applicant's present Ontario Street passenger station. It has been continuously operated since its construction by The Connotton Valley Railway Company and its successors, including the applicant.

Question 2. The general history of any past or existing receivership covering the line.

Answer. The only receivership covering the line proposed to be abandoned which has occurred during the past twenty-five years is the receivership of The Wheeling &

Lake Erie Railroad Company, the immediate precedessor of the applicant. This receivership grew out of a bill of complaint filed by The National Car Wheel Company against The Wheeling & Lake Erie Railroad Company on June 8, 1908 in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division (Equity No. 7549). On June 9, 1908 the Circuit Court appointed B. A. Worthington as Receiver of The Wheeling & Lake Erie Railroad Company. His receivership continued until June 20, 1912, when W. M. Duncan was appointed his successor. On October 30, 1916 the property of The Wheeling & Lake Erie Railroad Company was purchased at judicial sale for the ac- [fol. 257] count of the applicant. The Receiver ceased operation of the property at midnight on December 31, 1916, and was discharged April 13, 1927. Since January 1, 1917 this portion of the line of railroad has been operated continuously by the applicant.

Question 3. The investment cost of the line as shown by the applicant's books, stated as nearly as possible according to the primary accounts prescribed in the Interstate Commerce Commission classification of investment in road and equipment.

Answer. The investment cost of the line, including the Ontario Street passenger station, is not separately stated on the applicant's books. The applicant estimates that the cost of reproduction new of such property (exclusive of land) upon the basis of prices normal as of 1914 is about $47,315; and upon the basis of prices as of December 31, 1927, about $74,995. If depreciation is deducted in conformity with the percentages employed by the Bureau of Valuation of the Interstate Commerce Commission in valuing the applicant's property, the corresponding figures for reproduction new less depreciation would be $36,813 and $49,026. A copy of this estimate is attached hereto, marked Exhibit 1 and made a part hereof.

Question 4. Whether any aid, gift, grant or donation of anything of value was contributed in consideration of its construction.

Answer. No aid, gift, grant or donation of anything of value was contributed in consideration of the construction of this portion of applicant's line of railroad.

Question 5. The amount and description of any bonds, notes or other evidences of indebtedness resting in whole or in part upon the line in question, or upon the earnings thereof, or upon the earnings of any other line or lines of the applicant not covered by the application, and of any evidences of indebtedness not resting specifically upon the line in question, but which may be affected by the proposed abandonment.

[fol. 258] Answer. There are no securities resting wholly upon the line in question. The only securities resting in part upon the line in question are the following bonds:

$6,870,000, aggregate principal amount, of The Wheeling & Lake Erie Railroad Company First Consolidated Four Per Cent Mortgage Bonds.

$4,827,000, aggregate principal amounts, of applicant's Refunding Mortgage 4½ Per Cent Gold Bonds, Series A.

$2,894,000, aggregate principal amount, of applicant's Refunding Mortgage Five Per Cent Gold Bonds, Series B.

The only other securities which rest upon the earnings of the line in question or of any other line or lines of the applicant, or which may be affected by the proposed abandonment, are the following:

$409,000, aggregate principal amount, of applicant's Extension and Improvement Five Per Cent Mortgage Bonds.

$2,135,000, aggregate principal amount, of applicant's Six Per Cent Equipment Gold Notes.

$1,190,000, aggregate principal amount, of applicant's Prior Lien Five Per Cent Equipment Trust Certificates, Series C.

$6,814,500, aggregate principal amount, of applicant's Rent Notes, issued under National Railway Service Corporation's Equipment Trust Agreement, Series A, Lease Basis, dated June 1, 1921.

It is the opinion of the applicant that the sale of its lands north of Eagle Avenue at the option price of $1,600,000 will strengthen the applicant's financial position and the security for the various issues of bonds, certificates and notes above mentioned, for the reason that under the provisions of Article X of the applicant's First Consolidated Mortgage, applicant may expend the proceeds of this sale only in the purchase of other real estate, buildings, easements, chattels, rolling stock, materials, supplies, or other things necessary

or proper to be used in or about the construction, use, op-
[fol. 259] eration or maintenance of the railroads subject to said mortgage, or extensions thereof, which thereupon will become subject to the lien and operation of said mortgage.

Question 6. A copy of the applicant's general balance sheet as of the latest date for which such statement is available.

Answer. A copy of applicant's latest general balance sheet (as of October 31, 1928) is hereto attached, marked Exhibit 2, and made a part hereof.

Question 7. A copy of the applicant's income account for each of the five years next preceding the current year, and of such income account for that portion of the current year for which figures are available.

Answer. A statement of applicant's income account for the calendar years 1923-1927, both inclusive, and for the first ten months of 1928, is hereto attached, marked Exhibit 3, and made a part hereof.

Question 8. If the application covers less than the entire mileage operated by the applicant, the gross and net revenues and gross and net income for the portion sought to be abandoned, allocated thereto on a mileage pro rata basis.

Answer. Gross and net revenues and gross and net income allocated to that portion of the mileage to be abandoned, for the calendar years 1923 to 1927, inclusive, are as follows:

	1927	1926	1925	1924	1923
Gross Revenues....	$7,409.92	$8,552.83	$8,336.10	$7,492.82	$7,852.15
Net Revenues.....	1,803.69	2,428.54	2,450.12	1,603.05	1,822.29
Gross Income.....	1,393.50	1,967.57	1,950.09	1,211.27	1,468.53
Net Income.....	978.82	1,433.53	1,343.17	524.28	713.87

Question 9. A full explanation of the statements filed in response to the last preceding question, showing the method used, and the probable effect of continued operation upon the applicant's system earnings as a whole, with reasons for the conclusion.

[fol. 260] Answer. The apportionments shown in the answer to Question 8 were arrived at by applying the percentage (.040872 per cent) which the 1,035 feet of line to be abandoned bears to the total miles of line (479.6) owned and operated during each of the five years to the gross revenues,

net revenues, gross income and net income as reported to the Interstate Commerce Commission on page 301 of the annual reports for each of these years. In the opinion of the applicant its excess earnings will be at least as great if permission is granted to the applicant to abandon its property north of Eagle Avenue and to substitute therefor passenger station facilities temporarily in the Superior Avenue station of the Erie Railroad Company (hereinafter referred to as the "Erie") and finally in the union depot of The Cleveland Union Terminals Company (hereinafter referred to as the "Terminals"); particularly in view of the fact that it will be reimbursed by the Terminals for all rentals and other compensation which it must pay for the temporary use of the tracks and station facilities of the Erie and tracks of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company (hereinafter referred to as the "Big Four"), and finally will be furnished passenger station facilities and service in the union depot of the Terminals at a cost which in the opinion of the applicant will be substantially less than the probable cost to it of carrying charges on the lands, and carrying charges, depreciation, maintenance and operation of the buildings, tracks and equipment, necessary to provide the applicant with adequate passenger station facilities. In the opinion of the applicant, therefore, the abandonment of this portion of its line of railroad will tend to reduce its operating expenses and thereby to increase its net railway operating income and it net income.

Question 10. The names of all cities and incorporated villages located upon the line in question, by counties, with the approximate population of each, and the source of the information as to such population, and the names of all other railroads serving them.

[fol. 261] Answer. The line in question is located entirely within the City of Cleveland, Cuyahoga County, Ohio. According to the 1920 census the population of Cleveland was 796,841 and of Cuyahoga County 943,495. The Bureau of Census estimates that as of 1926 the population of Cleveland was 960,500 and of Cuyahoga County 1,148,400, and that as of 1928 the population of Cleveland is 1,010,300. Cleveland is served by the lines of the applicant, of the Baltimore & Ohio Railroad Company, the Erie, the Big

Four, the New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company and the Pennsylvania Railroad Company.

Question 11. The approximate population of the whole territory tributary to the line in question, with explanation of the method by which the limits of such territory were defined.

Answer. This question is not applicable.

Question 12. The distance in miles from another line of railroad of each city or village named in question 10.

Answer. This question is not applicable.

Question 13. The names of all railroads with which the line in question connects for interchange of traffic and the points of such connection and interchange.

Answer. This question is not applicable.

Question 14. The tonnage handled by the line in question, classified by principal commodities, for each of the five years next preceding the current year, stating separately the tonnage (a) originating and destined to points on the line and (b) interchanged with connecting carriers and moving over other lines.

Answer. The records of the applicant show the traffic handled by the portion of the line to be abandoned in carloads rather than in tons. The number of such carloads [fol. 262] handled, classified as between (a) packing house products and (b) other commodities, for each of the five years, 1923 to 1927, inclusive, is as follows:

	Number of car loads handled				
	1927	1926	1925	1924	1923
Packing House Products	1383	1658	1244	1152	785
Other Commodities	....	21	37	....	27
Total Car Loads	1383	1679	1281	1152	812

All of the above traffic was inbound, consigned to receivers of freight located on this portion of the line. The records of the applicant do not indicate separately the traffic (a) originating on its own line, and (b) received in interchange from other carriers. However, practically all of the packing house products handled by the applicant originate on the lines of other carriers.

During the year 1928 the total number of loaded cars handled over this portion of the applicant's line of railroad was 255, all containing packing house products. No shipments have been handled over this portion of the line since April or May 1928 for the reasons set forth in the answer to Question 17.

Question 15. The nature of industries located in the territory tributary to the line, such as farming, mining, lumbering, manufacturing, etc., how long established and the extent to which each such industry is dependent upon the line in question for transportation.

Answer. This question is not applicable.

Question 16. The passenger traffic handled on the line in question for each of the five years next preceding the current year, giving separately the number of local and connecting line passengers (if the latter designation is applicable) and the revenue derived from each class.

Answer. No record is kept of the number of passengers handled separately by stations. The passenger traffic of the applicant consists almost entirely of local traffic. The revenues derived from the transportation of outbound passengers from the Ontario Street passenger station for the five years are as follows:

[fol. 263] 1923	$130,589.69
1924	130,605.59
1925	115,074.60
1926	100,587.84
1927	82,558.53

The revenue received from inbound traffic is not readily available although it is considered that the revenue from this source would approximately equal the revenue from outbound traffic. However, it is customary to compute the traffic from each station on the outbound basis only, as the addition of the inbound revenue would result in a duplication.

Question 17. If the volume of traffic, freight or passenger, or both, has diminished during recent years, any reasons which may be assigned for such decrease.

Answer. The diminution and final disappearance of freight traffic on this portion of applicant's railroad during recent years has been due to the removal of applicant's

patrons from this vicinity and the demolition of their warehouses preparatory to the construction of buildings by the Terminals, or its allied or subsidiary companies; and to the purchase by the Terminals, or its allied companies, of properties adjoining the line in question. The decrease in passenger traffic on the line in question during recent years has been largely due to the effect of competition by busses and private automobiles.

Question 18. What effort, if any, has been made to dispose of the line in question so as to insure continued operation.

Answer. The disposition which applicant proposes to make of its property north of Eagle Avenue in the City of Cleveland, Ohio, will insure its continued use in common carrier service. If applicant secures the authority sought in this proceeding and in Finance Docket No. 7298, it proposes to exercise its option from The Cleveland Terminals Building Company (hereinafter referred to as the "Building Company") and to convey to the Building Company or to its nominee the lands which it owns north of Eagle [fol. 264] Avenue and to assign to the Building Company or to its nominee its leasehold interest in certain adjoining lands. Applicant is advised that the Building Company proposes to grant to the Terminals easements through said lands for the location of the Terminals' main tracks and their appurtenances entering the union depot of the Terminals from the east, and that these tracks will be operated by the Terminals or by its tenants (including The New York Central Railroad Company and The New York, Chicago and St. Louis Railroad Company) in common carrier service as contemplated by the certificate of public convenience and necessity issued by the Commission in its Finance Docket No. 1237.

Question 19. Opinion of counsel that the proposed abandonment is within the charter powers of the applicant.

Answer. See opinion of counsel attached hereto, marked Exhibit 4, and made a part hereof.

Question 20. All reasons relied upon in support of the application.

Answer. The reasons relied upon in support of the proposed abandonment are fully set forth in Section (f) of the

application filed herein, at pages 2 to 6 thereof, which reasons are incorporated herein by reference to the same extent as though set forth in full herein.

Question 21. A tracing of the original map or a blue print or white print of the original tracing on sheets 24" x 56" with plain lined margins, the inside dimensions of which shall be 23" x 55", drawn to a scale of 1"=200' or 1"=400', showing the location and route of the line affected by the proposed abandonment with its relation, within the limits of the sheet, to other railroads and other common carriers in the same territory. Also a skeleton index or route map, drawn to a scale of not less than ¼'=1 mile, on which shall be shown the line proposed to be abandoned, with its relation to other railroads or other common carriers that are within 20 miles on either side thereof and which shall be [fol. 265] shown at any convenient place on the first sheet of the map described above, if desired, or on a separate sheet of the dimensions given above, all to be substantially in accordance with Map Order, so called, pertaining to steam railway carriers, made and entered by the Commission under date of January 12, 1914, and modified and supplemented by Valuation Orers Nos. five (5), six (6) and twenty-three (23).

(Provided maps drawn to other specifications than those outlined in this paragraph have been prepared by applicant prior to receipt of this Questionnaire, such maps may be submitted for consideration, and if approved by the Commission may be substituted for the maps required under this paragraph.)

Answer. A tracing of the map which is attached as Exhibit 1 to the application filed herein, drawn to a scale of 1 inch=385 feet, is submitted herewith. This map shows the location and route of the line affected by the proposed abandonment with its relationship to other railroads in the same territory. This map was prepared by the applicant prior to the receipt of the questionnaire herein, and as it approximates the requirements of Question 21 of the questionnaire, applicant requests that it be approved by the Commission and accepted as a substitute for the original map described in Question 21.

Apparently the requirement for a skeleton, index or route map is not applicable to the abandonment sought by the application.

The Wheeling and Lake Erie Railway Company, by (Signed) Geo. Durham, Vice-President and General Manager.

[fol. 266] *Duly sworn to by George Durham. Jurat omitted in printing.*

[fol. 267] Proofs of Publication

Notice

The Wheeling and Lake Erie Railway Company hereby gives notice that on the 8th day of December, 1928, it filed with the Interstate Commerce Commission at Washington, D. C., its application for a certificate that the present and future public convenience and necessity permit the abandonment by it of that portion of its line of railroad extending northerly from the northerly line of Eagle Avenue to the northerly terminus of the applicant's line of railroad 1,035 feet, together with its Ontario Street passenger station, all in the City of Cleveland, Cuyahoga County, Ohio.

The Wheeling and Lake Erie Railway Company.

State of Ohio,
Cuyahoga County, ss:

I, M. Jarvis, being duly sworn, do, upon my oath, depose and say that I am bookkeeper of the Cleveland Plain Dealer, a newspaper printed in said county, and in general circulation therein, and that the annexed advertisement was published in said newspaper December 10th-17th- and 24th, 1928.

(Signed) M. Jarvis.

Sworn to and subscribed before me, this 24th day of December A. D. 1928. (Signed) U. W. Hird, Notary Public. (Seal.)

The State of Ohio,
Cuyahoga County, ss:

I, A. H. Bente, being duly sworn, do, upon my oath, depose and say that the annexed advertisement was published

in The Cleveland Press, a newspaper printed in said County of Cuyahoga, and having a general circulation therein, for the period of (3) three consecutive weeks, same day each week, from and after the 10th day of December, A. D. 1928 the first publication having been made on the said 10th day of December A. D. 1928, and the last on the 24th day of December A. D. 1928.

A. H. Bente.

Sworn to before me and subscribed in my presence by the said A. H. Bente this 26th day of December, A. D. 1928. Geo. B. Hart, Notary Public. (Seal.)

The State of Ohio,
Cuyahoga County, ss:

L. E. Smith being duly sworn, says that he is Clerk for the publishers of The Cleveland News, a public newspaper printed, published, and of general circulation in said County; and that the advertisement hereunto attached was published in said newspaper on the following days, December 10, 17 and 24, 1928.

(Signed) L. E. Smith.

Sworn to and subscribed before me this 26th day of December, 1928. (Signed) P. L. Emery, Notary Public for said County. (Seal.)

[fol. 268] Exhibit 1 to Return by Wheeling Co.

The Wheeling and Lake Erie Railway Company

Estimate of the Cost of Reproduction New and Cost of Reproduction Less Depreciation of Tracks and Structures North of Eagle Avenue in the City of Cleveland, Ohio, by I. C. C. Accounts

Acct. No.	Item	1914 price basis: Reproduction cost new	1914 price basis: Reproduction cost new less depreciation	1927 price basis: Reproduction cost new	1927 price basis: Reproduction cost new less depreciation
1	Engineering	$1,743	$1,743	$2,763	$2,763
3	Grading	10,275	7,982	17,993*	13,132
6	Bridges, Trestles & Culverts	1,619	890	2,757*	1,516
8	Ties	1,382	691	2,838	1,420
9	Rail	1,630	1,375	1,831	1,672
10	Other Track Material	1,286	806	2,135	1,324
11	Ballast	338	169	572	287
12	Tracklaying & Surfacing	971	635	2,085*	1,319
15	Crossing & Signals	50	35	75*	53
16	Stations and Office Buildings	23,472	18,998	34,738*	20,828
71-77	General Expenditures	642	499	1,016	664
76	Interest during Construction	3,907	3,040	6,192	4,048
		$47,315	$36,813	$74,995	$49,026

NOTE: Depreciation deduction computed according to percentages employed by Bureau of Valuation in valuing applicant's property.

[fol. 269] EXHIBIT 2 TO RETURN BY WHEELING CO.

The Wheeling and Lake Erie Railway Company General Balance Sheet

Assets

Item		Balance at close of Oct. 31, 1928
	Investments:	
(701)	Investment in Road and Equipment	$89,496,039.91
(704)	Deposits in Lieu of Mortgaged Property Sold	45,954.00
(706)	Investment in Affiliated Companies:	
	(a) Stocks	1,030,469.07
	(a) Bonds	2,224,000.00
	(c) Advances	447,362.21
(707)	Other Investments:	
	(a) Stocks	372.33
	(b) Bonds	2,500.00
	Total Investments	$93,246,697.52

*Factored by All Commodity Curve (1.48).

Item	Balance at close of Oct. 31, 1928
Current Assets:	
(708) Cash	$6,433,767.02
(710) Time Drafts and Deposits	
(711) Special Deposits	2,079,538.19
(713) Traffic & Car Service Balance—Receivable	269,361.33
(714) Net Balance Receivable from Agents and Conductors	115,030.02
(715) Miscellaneous Accounts Receivable	387,902.66
(716) Material and Supplies	1,018,171.62
(717) Interest and Dividends Receivable	34,365.95
(719) Other Current Assets	15,435.74
Total Current Assets	$10,353,572.53
[fol. 270] **Deferred Assets:**	
(720) Working Fund Advances	$7,522.51
Unadjusted Debits:	
(723) Rents and Insurance Paid in Advance	$21,847.97
(725) Discount on Funded Debt	60,050.42
(727) Other Unadjusted Debits	7,335,298.84
(728) Securities Issued or Assumed—Unpledged ($8,959,000.00)	
(729) Securities Issued or Assumed—Pledged ($9,358,000.00)	
Total Unadjusted Debits	$7,417,197.23
Grand Total	$111,024,989.79

Liabilities

Stock:		
(751) Capital Stock		$55,868,858.00
Long Term Debt:		
(755) Funded Debt Unmatured:		
(a) Book Liability	$43,910,800.00	
(b) Held by Respondent	18,317,000.00	$25,593,800.00

Item	Balance at close of Oct. 31, 1928
Current Liabilities:	
(759) Traffic & Car Service Balance—Payable	$40,973.29
(760) Audited Accounts & Wages Payable	2,319,230.65
(761) Miscellaneous Accounts Payable	47,950.98
(762) Interest Matured Unpaid	10,110.00
(763) Dividends Matured Unpaid	21.00
(766) Unmatured Interest Accrued	174,152.08
[fol. 271]	
(768) Other Current Liabilities	129,939.40
Total Current Liabilities	$2,722,377.40
Other Deferred Liabilities:	
(770) Other Deferred Liabilities	$386,209.11
Unadjusted Credits:	
(771) Tax Liabilities	$1,516,974.33
(776) Accrued Depreciation—Equipment	4,956,793.06
(778) Other Unadjusted Credits	528,928.03
Total Unadjusted Credits	$7,002,695.42
Corporate Surplus:	
(779) Addition to Property through Income and Surplus	$1,387,038.97
(780) Funded Debt Retired through Income and Surplus	190,000.00
(784) Profit and Loss—Balance	17,874,010.89
Total Corporate Surplus	$19,451,049.86
Grand Total	$111,024,989.79

(Here follows Exhibit 3 to Return, side folio 272)

EXHIBIT

The Wheelin

Income Account for Calendar Years 1

		Ten month October 3
	I. Operating Income.	
(501)	Railway operating revenues	$17,443,
(531)	Railway operating expenses	11,636,
	Net revenue from railway operations	5,806,
(532)	Railway tax accruals	1,480,
(533)	Uncollectible railway revenues	2,
	Total operating income	4,323,
	II. Nonoperating Income.	
(503)	Hire of freight cars—Credit balance	....
(504)	Rent from locomotives	61,
(505)	Rent from passenger-train cars	
(507)	Rent from work equipment	7,
(508)	Joint facility rent income	77,
(509)	Income from lease of road	5,
(510)	Miscellaneous rent income	23,
(511)	Miscellaneous nonoperating physical property	....
(514)	Income from funded securities	84,
(515)	Income from unfunded securities and accounts	142,
(519)	Miscellaneous income	3,
	Total nonoperating income	404,
	Gross income	4,728,
	III. Deductions from Gross Income.	
(536)	Hire of freight cars—Debit balance	164,
(537)	Rent for locomotives	23,
(538)	Rent for passenger-train cars	
(540)	Rent for work equipment	
(541)	Joint facility rents	77,
(543)	Miscellaneous rents	6,
(544)	Miscellaneous tax accruals	....
(546)	Interest on funded debt	704,
(547)	Interest on unfunded debt	38,
(548)	Amortization of discount on funded debt	3,
(551)	Miscellaneous income charges	2,
	Total deductions from gross income	1,021,
	Net income	3,706,

EXHIBIT 3 TO RETURN BY WHEELING CO.

The Wheeling and Lake Erie Railway Company

Income Account for Calendar Years 1923 to 1927, Inclusive, and for the First Ten Months of 1928

	Ten months ended October 31, 1928	Year ended December 31, 1927	Year ended December 31, 1926	Year ended December 31, 1925	Year ended December 31, 1924	Year ended December 31, 1923
ing Income.						
g revenues	$17,443,126.99	$18,129,586.49	$20,925,898.61	$20,395,618.51	$18,332,401.28	$19,211,572.21
g expenses	11,636,974.38	13,716,570.94	14,984,088.86	14,400,989.98	14,410,272.76	14,753,041.15
from railway operations	5,806,152.61	4,413,015.55	5,941,809.75	5,994,628.53	3,922,128.52	4,458,531.06
uals	1,480,731.66	1,462,570.89	1,664,998.00	1,568,458.00	1,255,606.00	1,327,311.00
way revenues	2,182.45	1,675.61	3,651.51	4,108.19	4,731.88	1,005.87
ing income	4,323,238.50	2,948,769.05	4,273,160.24	4,422,062.34	2,661,790.64	3,130,214.19
erating Income.						
rs—Credit balance	.....	29,986.46	109,162.35	.....	.....	.....
tives	61,699.75	72,085.95	62,287.46	52,140.42	43,618.75	36,045.17
ger-train cars	165.60	316.60	124.40	197.60	73.00	.....
equipment	7,122.25	6,380.72	10,483.39	8,712.40	7,215.27	10,429.43
income	77,470.97	95,920.53	60,603.89	46,174.36	41,236.17	40,101.42
of road	5,000.00	6,000.00	6,000.00	6,000.00	6,000.00	6,000.00
income	23,258.49	23,307.59	24,785.72	22,610.74	19,392.42	19,509.46
operating physical property	.....	.....	.....	9.60	9.60	.....
ed securities	84,406.28	102,354.84	104,766.25	103,291.25	100,278.75	100,278.75
nded securities and accounts	142,323.79	120,593.24	155,056.22	105,611.35	78,319.57	45,793.60
ne	3,458.69	3,702.83	7,558.43	4,408.54	5,637.02	204,630.70
erating income	404,905.82	460,648.76	540,828.11	349,156.26	301,780.55	462,788.53
me	4,728,144.32	3,409,417.81	4,813,988.35	4,771,218.60	2,963,571.19	3,593,002.72
tions from Gross Income.						
rs—Debit balance	164,162.81	.....	.....	46,073.33	294,944.34	371,118.22
ves	23,949.78	15,168.35	15,129.26	13,267.41	12,321.55	59,899.77
r-train cars	100.80	199.96	107.00	113.72	530.88	290.46
ipment	44.19	118.29	145.29	221.12	183.48	31.54
s	77,589.83	89,952.82	101,563.46	104,639.77	84,464.85	76,209.47
ts	6,015.40	291.70	192.70	164.50	742.20	1,529.18
accruals	.....	.....	.....	.....	.....	.....
d debt	704,858.17	878,102.50	1,137,177.53	1,278,881.33	1,254,246.67	1,303,701.56
ded debt	38,357.37	19,119.39	25,022.08	22,757.08	21,653.15	21,879.50
iscount on funded debt	3,857.29	8,309.15	23,621.35	14,636.64	11,740.44	11,740.44
me charges	2,850.00	3,322.18	3,675.00	4,185.00	.....	.....
ions from gross income	1,021,785.64	1,014,584.34	1,306,633.67	1,484,939.90	1,680,827.56	1,846,400.14
	3,706,358.68	2,394,833.47	3,507,354.68	3,286,278.70	1,282,743.63	1,746,602.58

[fol. 273] EXHIBIT 4 TO RETURN BY WHEELING CO.

Cleveland, Ohio, December 31, 1928.

The Interstate Commerce Commission, Washington, D. C.

DEAR SIRS: As General Counsel for The Wheeling and Lake Erie Railway Company (hereinafter referred to as the "Company") we are familiar with the provisions of the Articles of Incorporation and the Regulations of the Company and with the powers of the Company and of its authorized agents.

We have examined the resolutions adopted by the Board of Directors of The Wheeling and Lake Erie Railway Company on July 20, 1928 and November 23, 1928, pursuant to which the Company has filed with the Interstate Commerce Commission in its Finance Docket No. 7299 an application for a certificate of public convenience and necessity authorizing it to abandon a portion of its line of railroad including its Ontario Street passenger station in the City of Cleveland, Ohio. In our opinion the proposed abandonment is within the charter powers of the Company.

Yours respectfully, (Signed) Squire, Sanders & Dempsey, General Counsel for the Wheeling and Lake Erie Railway Company.

[fol. 274] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298

Application of THE WHEELING AND LAKE ERIE RAILWAY COMPANY for Certificate to Operate a Proposed Connecting Track and Passing Siding of the Cleveland Union Terminals Company in the City of Cleveland, Ohio, etc.

Finance Docket No. 7299

Application of THE WHEELING AND LAKE ERIE RAILWAY COMPANY for Certificate to Abandon a Portion of Its Line of Railroad, Including Its Ontario Street Passenger Station, in the City of Cleveland, Ohio

ORDER PERMITTING PITTSBURGH AND WEST VIRGINIA RY. TO INTERVENE—Jan. 17, 1929

Upon consideration of the record in the above entitled proceedings and petitions filed on behalf of The Pittsburgh

& West Virginia Railway Company for leave to intervene herein;

It is ordered, That said The Pittsburgh & West Virginia Railway Company be, and it is hereby, permitted to intervene and be treated as a party hereto.

It is further ordered, That a copy of each intervening petition and of this order be served upon the applicant and the Governor and Public Utilities Commission of Ohio; and that a copy of this order be served upon each of the parties to this proceeding.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 275] Before Interstate Commerce Commission

[Title omitted]

Docket No. 7298

Petition of The Pittsburgh & West Virginia Railway Company for Leave to Intervene

To the Honorable The Interstate Commerce Commission:

Now comes The Pittsburgh & West Virginia Railway [fol. 276] Company and respectfully avers that it has an interest in the matter in controversy in the above entitled proceeding, and desires to intervene and become a party to said proceeding, and for grounds of intervention says:

1. Your petitioner is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce in the States of Pennsylvania, West Virginia and Ohio.

2. The eastern terminus of your petitioner's line is Pittsburgh, Pennsylvania, and the western terminus is Pittsburgh Junction, Ohio, where it connects with the Wheeling & Lake Erie Railway, with which it exchanges a large pro-

portion of its freight to and from the lakes, and also to and from various Michigan points and also Chicago and points west.

3. Your petitioner further alleges that it is the owner and holder, as shown by the Stock Transfer Records, of 70,000 shares of the preferred and common stock of The Wheeling & Lake Erie Railway Company, and as such, and in the interests of all its stockholders, is interested in the operation of said railroad, and in the holding or disposition of that railroad's property, subject, of course, to the rights of the public and shippers, as established by law.

4. Your petitioner further alleges that the right to acquire passenger station facilities and service in the new Union Depot of The Cleveland Union Terminals Company and to [fol. 277] operate over certain lines of railroad, all as involved in the application herein, is so intimately connected with the right of the Wheeling to abandon a portion of its line of railroad, including its Ontario Street Passenger Station in the City of Cleveland, which latter is the subject of an application in Finance Docket No. 7299, and the subject matter of the two applications are so inter-related that neither can be properly considered independently of the other; and that, further, the abandonment by the Wheeling of a portion of its line of railroad, including its said Ontario Street Passenger Station, is, in turn, a part of a transaction by which the Wheeling is attempting to sell its said property so to be abandoned, together with other property to which it is entitled in connection with the vacation of streets abutting on said property; that a proper consideration of the subject of the application herein and of the application in Finance Docket No. 7299 requires a consideration of said proposed sale of said property.

5. Your petitioner further alleges that the plan involved in this application and the application in Finance Docket No. 7299, and in the proposed sale of the Wheeling's property, above referred to, involves transactions with The Cleveland Union Terminals Company and The Cleveland Terminals Building Company, which companies are controlled by the Nickel Plate Railroad and the New York Central Lines, which companies, together with the Baltimore &

Ohio Railroad Company, have acquired and are exercising control of the Wheeling & Lake Erie Railway Company; that the transactions involved in these applications are not [fol. 278] in the interests of, but are prejudicial to, The Wheeling & Lake Erie Railway Company and its stockholders and involve acts in violation of the laws of the United States and of the State of Ohio.

6. In view of the foregoing, the granting of the application herein would not only be prejudicial to the interests of your petitioner, but it would not be in the public interest.

Wherefore, your petitioner, The Pittsburgh & West Virginia Railway Company, prays leave to intervene and be treated as a party hereto, with the right to have notice of, and to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard by counsel upon brief and at the oral argument, if oral argument is granted.

The Pittsburgh & West Virginia Railway Company, by (Signed) F. E. Taplin, President. (Signed) C. F. Taplin, General Counsel.

January 12, 1929.

[fol. 279] Before Interstate Commerce Commission

[Title omitted]

Docket No. 7298

Intervening Petition of The Pittsburgh & West Virginia Railway Company

To the Honorable the Interstate Commerce Commission:

Now comes The Pittsburgh & West Virginia Railway Company, and, for its intervening petition herein, says:

1. It is a railroad corporation duly incorporated and organized under the laws of the States of Pennsylvania and [fol. 280] West Virginia having its principal place of business in the City of Pittsburgh, Pennsylvania.

2. The eastern terminus of its line is Pittsburgh, Pennsylvania and the western terminus is Pittsburgh Junction Ohio where it connects with the line of applicant and with which it exchanges a large portion of its freight to and from the lakes and to and from Michigan, Chicago and points west thereof.

3. It is the owner and holder, as shown by the stock transfer records, of 70,000 shares of the preferred and common stock of applicant, and, as such, and in the interests of all applicant's stockholders, is interested in the operation of The Wheeling & Lake Erie Railway Company and in the holding or disposition of its property, subject, of course, to the rights of the public and shippers, as established by law.

4. The right of applicant to acquire passenger station facilities and service in the proposed Union Depot of The Cleveland Union Terminals Company (hereinafter referred to as "Terminals") and to temporarily operate and use certain tracks and station facilities of Erie Railroad Company (hereinafter referred to as "Erie") and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter referred to as "Big Four") all as is involved in the application herein, is so intimately connected with the right of applicant to abandon a portion of its line of railroad, including its Ontario Street passenger station in the City of Cleveland, Ohio, which latter is the subject of [fol. 281] an application in Finance Docket No. 7299, and the subject matter of the two applications is so interrelated that neither can be properly considered independently of the other; and further the abandonment by applicant of a portion of its line of railroad, including its Ontario Street passenger station, is in turn a part of a transaction by which applicant is attempting to sell its property so to be abandoned together with other property to which it is entitled in connection with the vacation of streets abutting thereon; that a proper consideration of the subject of the application herein and of the application in Finance Docket No. 7299 requires a consideration of the proposed sale of the property sought to be abandoned.

5. The action of applicant in entering into the agreements with Terminals, Erie and Big Four, copies of which are

attached to the application herein filed, and the proposed action of applicant to abandon a portion of its line of railroad and its Ontario Street passenger station and to exercise the option which it has procured to sell the same to The Cleveland Terminals Building Company (hereinafter referred to as "Building") for $1,600,000, which proposed action is the subject matter of an application in Finance Docket No. 7299, is not in the interest of the public nor the applicant, but is prejudicial to the public interest, the applicant and its stockholders and is unlawful and illegal for the following reasons, to-wit:

(a) It is authorized by directors who have been and are unlawfully and illegally holding office as such by reason [fol. 282] of the fact that they were elected by the votes of stock owned by The Baltimore & Ohio Railroad Company (hereinafter referred to as "B. & O.") The New York Central Railroad Company (hereinafter referred to as "Central") and The New York, Chicago & St. Louis Railroad Company (hereinafter referred to as "Nickel Plate") which three latter companies are competitors of applicant, and which stock was acquired by B. & O., Central and Nickel Plate contrary to the laws of the State of Ohio and pursuant to a preconceived plan, agreement and conspiracy to suppress competition, restrain trade and commerce among the several states and create a monopoly contrary to Section 6391 et seq. of the General Code of Ohio and which stock so acquired was acquired without the consent of this Commission as required by paragraph 2 of Section 5 of the Interstate Commerce Act as amended and by the Transportation Act of 1920 and contrary to Sections 1 and 2 of the Sherman Anti-Trust Act, Section 7 of the Clayton Anti-Trust Act and Section 37 of the United States Criminal Code, otherwise known as Section 10201 of the United States Compiled Statutes of 1916.

(b) The agreement between applicant and Big Four and the agreement between applicant and Erie, the agreement between applicant and Building and the agreements between applicant and Terminals are agreements upon the part of applicant, Big Four and Erie to aid Terminals in the construction of its terminal railroad and union depot for the purpose of connecting the two railroads of appli-

cant and Terminals and of permitting Terminals to connect its terminal railroad with the railroads of other companies, without first securing the consent thereto of two thirds of the stockholders of applicant, Big Four, Erie and Terminals as required by Sections 8806 and 8809 of the [fol. 283] General Code of Ohio.

(c) The agreement between applicant and Building is a proposed sale to and purchase by Terminals of a part of applicant's railroad so that the lines of applicant and Terminals will be connected and continuous, without first securing the consent thereto of two-thirds of the stockholders of applicant and Terminals as required by Sections 8807 and 8809 of the General Code of Ohio.

(d) The agreement between applicant and Terminals to use Terminals' railroad and union depot for a period of twenty-five years at a base rental of $20,000 per annum renewable for a like period and thereafter renewable for a period of fifty years upon the terms and conditions in such agreement set forth, is a lease by Terminals to applicant of a part of Terminals' railroad and union depot, now in the course of construction, and which lease is proposed without first securing the consent thereto of two-thirds of the stockholders of applicant and Terminals as required by Sections 8807 and 8809 of the General Code of Ohio.

(e) The agreement between applicant and Big Four is a lease to applicant of a part of the railroad of Big Four, and the agreement between applicant and Erie is a lease to applicant of a part of the railroad of Erie, both leases being proposed for the purpose of connecting the railroad of applicant with the railroads of Erie and Big Four, without having first secured the consent thereto of two-thirds of the stockholders of applicant, Big Four and Erie as required by Sections 8807 and 8809 of the General Code of Ohio.

(f) The agreements between applicant and Big Four, applicant and Erie, applicant and Building, applicant and Terminals are agreements for the alleged common benefit of applicant, Big Four and Terminals after the railroads of applicant and Big Four are connected with the railroad

of Terminals which agreements are proposed without first obtaining the consent of two-thirds of the stockholders of applicant, Big Four and Terminals as requested by Sections 8808 and 8809 of the General Code of Ohio.

[fol. 284] (g) It is an attempt by those directors of applicant who were elected as such by the votes of stock owned by B. & O., Central and Nickel Plate to change one of the termini of its road without first obtaining the consent thereto of three-fourths of its stockholders as required by Section 8747 of the General Code of Ohio.

(h) It is an attempt by those directors of applicant who were elected as such by the votes of stock owned by B. & O., Central and Nickel Plate to extend applicant's line of railroad beyond its previously designated termini without first obtaining the consent thereto of a majority of applicant's stockholders as required by Section 8772 of the General Code of Ohio.

(i) It is an attempt upon the part of B. & O., Central and Nickel Plate through their control of applicant and twelve of applicant's directors to acquire for Terminals, which is controlled by Central and Nickel Plate, applicant's Ontario Street passenger station site at a price satisfactory to themselves but far less than the fair and reasonable value thereof or the best price obtainable therefor.

(j) Those directors of applicant who authorized the execution of the contracts hereinabove referred to and the action which it is now proposed by applicant to take were not and are not competent or qualified so to do by reason of their interest therein due to the fact that they held and hold their offices by virtue of the votes of stock owned by Central and Nickel Plate, which two latter companies not only own and control Terminals but are under obligation to Terminals to obtain for it the property sought to be abandoned by applicant.

[fol. 285] (k) It is an attempt upon the part of B. & O., Central and Nickel Plate to force applicant to use the facilities of Terminals and thereby contribute to the excessive cost of erecting, maintaining and operating Terminals' railroad and union depot.

Wherefore your intervenor prays for an order denying the application of applicant.

The Pittsburgh & West Virginia Railway Company, by Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, Attorneys for Intervenor.

[fols. 286-289] Intervening petition of Pittsburgh & West Virginia Ry. Co. omitted; printed side page 275 ante.

[fols. 290-296] Supplemental intervening petition of Pittsburgh & West Virginia Ry. Co. omitted; printed side page 279 ante.

[fol. 297] Before Interstate Commerce Commission

Finance Docket No. 7298

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Finance Docket No. 7299

Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Order Granting Petition of Intervenor, Pittsburgh & West Virginia Ry. Co.—Mar. 23, 1929

It appearing, That at a hearing held in the above-entitled proceedings the intervener, Pittsburgh & West Virginia Railway Company, offered in evidence certain testimony and exhibits which upon objection by the applicant, were excluded from the record by the examiner;

It further appearing, That said intervener has filed a petition for review of the examiner's rulings; that the applicant has filed an answer thereto; that the said intervener has filed a rejoinder to said answer, and that oral argument has been had:

It is ordered, That the petition of the intervener, Pittsburgh & West Virginia Railway Company, be, and it is hereby, granted.

It is further ordered, That the hearing in the above-entitled proceeding be resumed at a time and place to be hereafter determind.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 298] Before Interstate Commerce Commission

Finance Docket No. 7298

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry Co.

Finance Docket No. 7299

Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry Co.

Order re Hearing—Mar. 26, 1929

The above entitled proceedings are assigned for further hearing April 1, 1929, ten o'clock a. m., (standard time) at the office of the Interstate Commerce Commission, Washington, D. C., before Examiner T. F. Sullivan.

By the Commission:

George B. McGinty, Secretary.

[fol. 299] Before Interstate Commerce Commission

Finance Docket No. 7298

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Finance Docket No. 7299

Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Order re Hearing—Mar. 27, 1929

Further hearing in the above entitled proceedings, now assigned for April 1, 1929, at Washington, D. C., before Examiner T. F. Sullivan, is cancelled.

By the Commission:

George B. McGinty, Secretary.

[fol. 300] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

Finance Docket No. 7299

Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.

ORDER DENYING REHEARING ON ORDER GRANTING PETITION OF INTERVENOR FOR REVIEW—April 22, 1929

The Commission having under consideration the petition of the Wheeling & Lake Erie Railway Company for a rehearing on the order of Division 4 granting the petition of the Pittsburgh & West Virginia Railway Company, intervener, for review of the examiner's rulings at a hearing in the above-entitled proceedings excluding certain testimony and exhibits, and the answer of the Pittsburgh & West Virginia Railway Company to the petition of the said Wheeling & Lake Erie Railway Company:

It is ordered, that the petition of the said Wheeling & Lake Erie Railway Company be, and it is hereby, denied.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fols. 301-303] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 7298

[Title omitted]

PETITION OF THE CLEVELAND UNION TERMINALS COMPANY FOR LEAVE TO INTERVENE

To the Honorable The Interstate Commerce Commission:

Now comes The Cleveland Union Terminals Company and states that it has an interest in the matters at issue in

the above entitled proceeding, and desires to intervene and become a party to said proceeding, and for grounds of intervention alleges:

[fol. 304] 1. That it is a Union Depot Company organized under the laws of the State of Ohio, Subdivision 2, entitled, "Public Service Corporations Other Than Railroads," Chapter 1, "Union Depot," General Code 9160, et seq., and as such is subject to the Interstate Commerce Act.

2. That it is engaged in the construction of a Union Passenger Terminal adjacent to the Public Square in the City of Cleveland, Ohio, and extending with its approaches from about East 40th Street to about West 37th Street in said city.

3. That it is engaged in the construction of said Union Passenger Terminal pursuant to and in conformity with the report and order of the Commission decided December 6, 1921, Finance Docket No. 1237, wherein the Commission certified that the present and future public convenience and necessity required and will require the construction and operation of a terminal station and the approaches thereto in the City of Cleveland, Ohio, as described in the applications and the report aforesaid, and ordering that The New York Central Railroad Company, The Cleveland Cincinnati Chicago and St. Louis Railway Company and The New York Chicago and St. Louis Railroad Company, be, and they were thereby authorized to construct and operate said terminal station and approaches by and through control of and contract with The Cleveland Union Terminals Company in the manner described in said applications and report.

4. That the applications in said proceeding proposed a definite plan for the construction, operation, control and financing of said station and route, and the essential feature of said plan were fixed by certain contracts filed with the applications. One of the contracts proposed to be entered into between the applicants in said proceeding and The Cleveland Union Terminals Company and approved by the Commission is known as the Union Passenger Terminal Agreement, which agreement, subsequent to the report and order of the Commission, and in compliance therewith, was executed between the parties on December

8, 1921. Attached to and made a part of said contract as exhibits were plans illustrating the construction and layout of the tracks and station and the tracks on the approaches thereto showing, among other things, that the tracks on [fol. 305] the Easterly Approach ran through and occupied the major portion of the property of The Wheeling and Lake Erie Railway Company referred to in the application herein, at elevation 52, Cleveland City datum.

5. That The Wheeling and Lake Erie Railway Company, applicant herein, intervened in said proceeding in Finance Docket No. 1237 and became a party thereto but subsequently withdrew from said proceeding upon a stipulation, dated April 21, 1921, being entered into between it and the applicants therein and The Cleveland Union Terminals Company providing that any order made therein granting a certificate of public convenience necessity in whole or in part should be without prejudice or bar to or influence upon any rights of The Wheeling and Lake Erie Railway Company under the laws of the State of Ohio in relation to its present freight and passenger facilities in the City of Cleveland, Ohio, and that in the event any application should be made by The Cleveland Union Terminals Company, its successors or assigns, or the applicants therein, or any one or more of them for a right to cross or to fix the mode and manner of crossing the property, tracks or right of way of The Wheeling and Lake Erie Railway Company at grade or above or below grade at any point north of the Cuyahoga River crossing of The Wheeling and Lake Erie Railway Company, in the City of Cleveland, the entire cost of and physical damages caused by such crossing should be borne by The Cleveland Union Terminals Company, its successors or assigns, or any one or more of the applicants therein who sought such right which said stipulation between said parties was supplemented and ratified by a supplementary stipulation entered into January 26, 1922, and filed in said Finance Docket No. 1237.

6. That pursuant to said report and order of the Commission in Finance Docket No. 1237, and the provisions of its ordinance contract with the City of Cleveland, Ohio, your petitioner began the construction of the Union Passenger Terminal, and during the progress of said construction, it

was required under the terms of said ordinance contract by said City to construct for said City and as and for a public highway what is known as the Eagle Avenue bridge, which bridge is constructed over the main line of The Wheeling and Lake Erie Railway Company at an elevation which [fol. 306] makes it impossible for The Wheeling and Lake Erie Railway Company to raise the grade of its tracks between said Eagle Avenue bridge and the location of its Ontario Street passenger station, and thereby it has become impossible for The Wheeling and Lake Erie Railway Company to occupy and use its said property north of said Eagle Avenue bridge for railway purposes at its then and present existing track elevation, and at the same time permit the construction of the tracks of your petitioner through the property of The Wheeling and Lake Erie Railway Company at said elevation 52.

7. That upon the application of your petitioner filed in Finance Dockets Nos. 2354, decided June 9, 1922; 2971, decided Jnue 13, 1923; 4861, decided June 20, 1925 and 6668, decided January 20, 1928, the Commission has approved and authorized the issue of, and your petitioner has issued and sold, and there are outstanding in the hands of the public, its first mortgage bonds in the amount of $42,000,000.00, the proceeds of which have been expended in the acquisition of land and the construction of its Union Passenger Terminal, together with advances made by the Proprietary Companies in the amount of approximately $19,000,000.00 used and expended for the same purposes, aggregating $61,000,000.00 which have been expended to date for said purposes, and that it is now estimated that the total cost of completing the passenger terminal and its approaches will be approximately $88,000,000.00, all of which expenditures and contemplated expenditures are in accordance with said contract and plans so approved by the Commission as hereinbefore set forth.

8. That the entire Union Passenger Terminal project is approximately 75 to 80 per cent completed; that substantially all contracts for its completion have been let, and work under all of said contracts is in process of execution, excepting the construction work across the property of The Wheeling and Lake Erie Railway Company; that the

construction program of your petitioner calls for the completion of its passenger terminal on January 1, 1930, and its passenger terminal can be completed and put into service on or before said date only if your petitioner is able to acquire the right presently to enter upon and go through the property of The Wheeling and Lake Erie Railway Com-
[fol. 307] pany in accordance with said plans so approved; that the time necessary to complete the construction work of your petitioner on said property will take until about said completion date, and that any delay on account of its inability to obtain such right, extending the time of completion beyond January 1, 1930, will result in additional costs of completion at the rate of about $365,000.00 per month for interest charges alone.

9. That if The Wheeling and Lake Erie Railway Company be not permitted to abandon its present facilities north of Eagle Avenue as prayed for in Finance Docket No. 7299, and to make temporary use of the Superior Avenue depot of the Erie Railroad Company and ultimate permanent use of the Union Passenger Terminal of your petitioner, as prayed for in its application herein, your petitioner will be required to change and lower the grade of its tracks on the Easterly Approach through the property of The Wheeling and Lake Erie Railway Company with the result that the grade of the entire station area will have to be changed and lowered, making it necessary to rebuild or under-pin the vast amount of construction work already completed in said area and on said Easterly Approach at an expense of many millions of dollars with a resulting grade of the tracks in the station itself making it unsafe for standing cars, and highly undesirable in operation and seriously impair the usefulness of said station for the purposes to which it is to be devoted, and your petitioner alleges that in the public interest and convenience as related to The Cleveland Union Terminals Company, it is of paramount importance that The Wheeling and Lake Erie Railway Company be authorized to abandon that portion of its line of railroad lying northerly of the northerly line of Eagle Avenue including its Ontario Street passenger station as prayed for in Finance Docket No. 7299, and to operate the tracks and station facilities, and to acquire the passenger station facilities and service of your petitioner as prayed for in its application herein.

[fol. 308] Wherefore your petitioner, The Cleveland Union Terminals Company, begs leave to intervene and become a party hereto, with the right to have notice of, and to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard by counsel upon brief and at the oral argument, if oral argument is granted.

The Cleveland Union Terminals Company, by C. L. Bradley, President, Terminal Tower Building, Cleveland, Ohio. Charles W. Stage, General Counsel. W. H. Boyd, H. H. McKeehan, Attorneys, Terminal Tower Building, Cleveland, Ohio.

May 8th, 1929.

[fols. 309-311] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 7299

[Title omitted]

PETITION OF THE CLEVELAND UNION TERMINALS COMPANY FOR LEAVE TO INTERVENE

To the Honorable The Interstate Commerce Commission:

Now comes The Cleveland Union Terminals Company and states that it has an interest in the matters at issue in the above entitled proceeding, and desires to intervene and become a party to said proceeding, and for grounds of intervention alleges:

1. That it is a Union Depot Company organized under the laws of the State of Ohio, Subdivision 2, entitled "Public Service Corporations Other Than Railroads," Chapter [fol. 312] 1, "Union Depot," General Code 9160, et seq., and as such is subject to the Interstate Commerce Act.

2. That it is engaged in the construction of a Union Passenger Terminal adjacent to the Public Square in the City of Cleveland, Ohio, and extending with its approaches from about East 40th Street to about West 37th Street in said city.

3. That it is engaged in the construction of said Union Passenger Terminal pursuant to and in conformity with the

report and order of the Commission decided December 6, 1921, Finance Docket No. 1237, wherein the Commission certified that the present and future public convenience and necessity required and will require the construction and operation of a terminal station and the approaches thereto in the City of Cleveland, Ohio, as described in the applications and the report aforesaid, and ordering that The New York Central Railroad Company, The Cleveland Cincinnati Chicago and St. Louis Railway Company and The New York Chicago and St. Louis Railroad Company, be, and they were thereby authorized to construct and operate said terminal station and approaches by and through control of and contract with The Cleveland Union Terminals Company in the manner described in said applications and report.

4. That the applications in said proceeding proposed a definite plan for the construction, operation, control and financing of said station and route, and the essential features of said plan were fixed by certain contracts filed with the applications. One of the contracts proposed to be entered into between the applicants in said proceeding and The Cleveland Union Terminals Company and approved by the Commission is known as the Union Passenger Terminal Agreement, which agreement, subsequent to the report and order of the Commission, and in compliance therewith, was executed between the parties on December 8, 1921. Attached to and made a part of said contract as exhibits were plans illustrating the construction and layout of the tracks and station and the tracks on the approaches thereto showing, among other things, that the tracks on the Easterly Approach ran through and occupied the major portion of the property of The Wheeling and Lake Erie Railway Company referred to in the application herein, at elevation 52, Cleveland City datum.

[fol. 313] 5. That that Wheeling and Lake Erie Railway Company, applicant herein, intervened in said proceeding in Finance Docket No. 1237 and became a party thereto but subsequently withdrew from said proceeding upon a stipulation dated April 21, 1921, being entered into between it and the applicants therein and The Cleveland Union Terminals Company providing that any order made therein

granting a certificate of public convenience and necessity in whole or in part should be without prejudice or bar to or influence upon any rights of The Wheeling and Lake Erie Railway Company under the laws of the State of Ohio in relation to its present freight and passenger facilities in the City of Cleveland, Ohio, and that in the event any application should be made by The Cleveland Union Terminals Company, its successors or assigns, or the applicants therein, or any one or more of them for a right to cross or to fix the mode and manner of crossing the property, tracks or right of way of The Wheeling and Lake Erie Railway Company at grade or above or below grade at any point north of the Cuyahoga River crossing of The Wheeling and Lake Erie Railway Company, in the City of Cleveland, the entire cost of and physical damages caused by such crossing should be borne by The Cleveland Union Terminals Company, its successors or assigns, or any one or more of the applicants therein who sought such right which said stipulation between said parties was supplemented and ratified by a supplementary stipulation entered into January 26, 1922, and filed in said Finance Docket No. 1237.

6. That pursuant to said report and order of the Commission in Finance Docket No. 1237, and the provisions of its ordinance contract with the City of Cleveland, Ohio, your petitioner began the construction of the Union Passenger Terminal, and during the progress of said construction, it was required under the terms of said ordinance contract by said City to construct for said City and as and for a public highway what is known as the Eagle Avenue bridge, which bridge is constructed over the main line of The Wheeling and Lake Erie Railway Company at an elevation which makes it impossible for The Wheeling and Lake Erie Railway Company to raise the grade of its tracks between said Eagle Avenue bridge and the location of its Ontario Street passenger station, and thereby it has become impossible for The Wheeling and Lake Erie Railway Company to [fol. 314] occupy and use its said property north of said Eagle Avenue bridge for railway purposes at its then and present existing track elevation, and at the same time permit the construction of the tracks of your petitioner through the property of The Wheeling and Lake Erie Railway Company at said elevation 52.

7. That upon the application of your petitioner filed in Finance Dockets Nos. 2354, decided June 9, 1922; 2971, decided June 13, 1923; 4861, decided June 20, 1925, and 6668, decided January 20, 1928, the Commission has approved and authorized the issue of, and your petitioner has issued and sold, and there are outstanding in the hands of the public, its first mortgage bonds in the amount of $42,000,000.00, the proceeds of which have been expended in the acquisition of land and the construction of its Union Passenger Terminal, together with advances made by the Proprietary Companies in the amount of approximately $19,000,000.00 used and expended for the same purposes, aggregating $61,000,000.00 which have been expended to date for said purposes, and that it is now estimated that the total cost of completing the passenger terminal and its approaches will be approximately $88,000,000.00, all of which expenditures, and contemplated expenditures are in accordance with said contract and plans so approved by the Commission as hereinbefore set forth.

8. That the entire Union Passenger Terminal project is approximately 75 to 80% completed; that substantially all contracts for its completion have been let, and work under all of said contracts is in process of execution, excepting the construction work across the property of The Wheeling and Lake Erie Railway Company; that the construction program of your petitioner calls for the completion of its passenger terminal on January 1, 1930, and its passenger terminal can be completed and put into service on or before said date only if your petitioner is able to acquire the right presently to enter upon and go through the property of The Wheeling and Lake Erie Railway Company in accordance with said plans so approved; that the time necessary to complete the construction work of your petitioner on said property will take until about said completion date, and that any delay on account of its inability to obtain such right, extending the time of completion beyond January 1, [fol. 315] 1930, will result in additional costs of completion at the rate of about $365,000.00 per month for interest charges alone.

9. That if The Wheeling and Lake Erie Railway Company be not permitted to abandon its present facilities north

of Eagle Avenue as prayed for in its application herein, and to make temporary use of the Superior Avenue depot of the Erie Railroad Company and ultimate permanent use of the Union Passenger Terminal of your petitioner, as prayed for in Finance Docket No. 7299, your petitioner will be required to change and lower the grade of its tracks on the Easterly Approach through the property of The Wheeling and Lake Erie Railway Company with the result that the grade of the entire station area will have to be changed and lowered, making it necessary to rebuild or underpin the vast amount of construction work already completed in said area and on said Easterly Approach at an expense of many millions of dollars with a resulting grade of the tracks in the station itself making it unsafe for standing cars, and highly undesirable in operation and seriously impair the usefulness of said station for the purposes to which it is to be devoted, and your petitioner alleges that in the public interest and convenience as related to The Cleveland Union Terminals Company, it is of paramount importance that The Wheeling and Lake Erie Railway Company be authorized to abandon that portion of its line of railroad lying northerly of the northerly line of Eagle Avenue including its Ontario Street passenger station as prayed for in its application herein, and to operate the tracks and station facilities, and to acquire the passenger station facilities and service of your petitioner as prayed for in its application in Finance Docket No. 7299.

[fol. 316] Wherefore your petitioner, The Cleveland Union Terminals Company, begs leave to intervene and become a party hereto, with the right to have notice of, and to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard by counsel upon brief and at the oral argument, if oral argument is granted.

The Cleveland Union Terminals Company, by C. L. Bradley, President, Terminal Tower Building, Cleveland, Ohio. Charles W. Stage, General Counsel. W. H. Boyd, H. H. McKeehan, Attorneys, Terminal Tower Building, Cleveland, Ohio.

May 8, 1929.

[fol. 317] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298

Operation of Passenger Terminal Facilities at Cleveland, Ohio, by WHEELING & LAKE ERIE RY. CO.

Finance Docket No. 7299

Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by WHEELING & LAKE ERIE RY. CO.

ORDER ASSIGNING FOR ARGUMENT—May 27, 1929

The above entitled proceedings are assigned for oral argument, June 17, 1929, ten o'clock a. m. (standard time), at the office of the Interstate Commerce Commission, Washington, D. C., before the Commission.

By the Commission:

George B. McGinty, Secretary.

Note.—This argument begins at 10:00 a. m.

In the District Court of the United States

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Complainant,

vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE WHEELING & LAKE ERIE RAILWAY COMPANY, *et al.*,
Defendants.

No. 3075.

NARRATIVE FORM OF THE TESTIMONY TAKEN BEFORE THE INTERSTATE COMMERCE COMMISSION OFFERED AND RECEIVED IN EVIDENCE IN THE DISTRICT COURT.*

In this narrative form of testimony counsel have sometimes referred to certain corporations in an abbreviated form as follows: The Wheeling and Lake Erie Railway Company, as "applicant" or as "Wheeling"; The Cleveland Union Terminals Company, as "Terminals"; The Cleveland Terminals Building Company, as "Building"; The Cleveland Traction Terminals Company, as "Traction"; The New York Central Railroad Company, as "Central"; The New York, Chicago and St. Louis Railroad Company, as "Nickel Plate"; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as "Big Four"; The Baltimore & Ohio Railroad Company, as "B. & O."; Erie Railroad Company, as "Erie"; and The Hocking Valley Railway Company, as "Hocking."

GEORGE DURHAM, called as a witness for the applicant, testified as follows:

January 21, 1929.

DIRECT EXAMINATION by Mr. Martin.

I reside at Cleveland, Ohio, and am Vice President, General Manager and a Director of Wheeling, having held

*Testimony enclosed in [ ] indicates that which was included at the

the position of Vice President and General Manager since October 1923, and of Director since May 20th, 1927. I assumed management of Wheeling's properties May 15th, 1923, when I was appointed Acting General Manager. I have had about twenty-six and one-half years previous railroad experience, including engineering, operating and mechanical, being seventeen years with the Louisville & Nashville, five and one-half years with the Delaware, Lackawanna & Western, and four years with Wheeling from 1916 to 1920, returning in March 1923, with offices since that date at Cleveland.

[Soon after my return to the property in 1923 my attention was called to certain negotiations that had been had, but not completed, with the Terminal Company in relation to the use of the Wheeling's tracks for wasting of certain materials taken from their station site, and that there had been proposed a switch-back arrangement in which the suggestion was made that the Wheeling might see its way clear to supplement its Commercial Street Freight Station at the lower level with additional freight facilities on the higher level that were contemplated by the Nickel Plate. From that time on it was necessary in the discharge of my duties to consider and keep advised as to the situation relating to future passenger station facilities required by the Wheeling in the downtown section of Cleveland and to the disposition to be made of its lands north of Eagle Avenue. The questions which have developed during the last five years in connection with these matters have been numerous and have required frequent consideration, making it necessary to go into them in considerable detail. I have thus become quite familiar with them.]

I signed and verified the applications and returns to questionnaires which were filed in Wheeling's behalf in Finance Dockets 7298 and 7299, all of which was authorized by Wheeling's directors at meetings held July 20th, 1928, and November 23rd, 1928. Notice of the pendency of these proceedings was published in accordance with the regulations of the Interstate Commerce Commission.

Wheeling is a common carrier subject to the Interstate Commerce Act, incorporated December 14th, 1916, under the laws of the State of Ohio, and commenced operations January 1st, 1917. It operates in both freight and passenger service.

[I have here a map showing the Wheeling & Lake Erie Railway and its principal connections marked "Applicant's

Exhibit No. 1," which I now offer in evidence. "Applicant's Exhibit No. 1, Witness Durham" was received in evidence.

This map shows the lines of the applicant and its principal connections with other carriers. It will be noted from it that the lines of the applicant consist of three divisions; the first of these is known as the Cleveland Division and extends from Cleveland, Ohio, in a general southerly direction to Zanesville, Ohio; the second is the Toledo Division extending from Toledo, Ohio, in a general southeasterly direction to Warrenton, Ohio, and crossing the Cleveland Division at Harmon, Ohio; the third is the River Division extending from Steubenville, Ohio, via Warrenton, where it connects with the Toledo Division, at Aetnaville, Ohio. From a point near Aetnaville, known as Terminal Junction, the passenger trains of the applicant operate over the tracks of the Wheeling Terminal Railway Company into the City of Wheeling, W. Va.]

At present Wheeling is operating four passenger trains into Cleveland on week days and three trains on Sundays, [as follows:

Train No. 37, daily except Sunday, leaves Kent at 6:30 a. m., arrives Cleveland 7:40 a. m. This train is used by commuters from Kent, Twinsburg, Bedford and intermediate stations, carries baggage, milk and cream, but no express or mail. On its return trip to Kent it is operated as a local freight train and does the switching wherever required at intermediate stations. It normally consists of three cars.

Train No. 31, daily, gas-electric operated, leaves Canton 8:00 a. m., arrives Cleveland 9:55 a. m. This train stops at intermediate stations Canton to Kent, to receive and discharge passengers. It does not stop at stations between Kent and East 93rd Street (Cleveland) except to discharge passengers from points south of Kent. Baggage and express are carried to and from points where it is scheduled to stop. It normally consists of two cars.

Train No. 33, daily, leaves Wheeling 7:15 a. m. and arrives Cleveland 1:25 p. m. This train carries baggage, express, United States mail, milk and cream, and newspaper packages as well as passengers, and stops at nearly all stations. In addition it receives passengers, mail, express, baggage, milk and cream at Harmon for points north thereof from train No. 3, leaving Zanesville at 7:15 a. m. This train also carries a cafe parlor car in which meals and refreshments are served. It normally consists of four cars.

Train No. 35, daily, leaves Wheeling at 3:00 p. m. and arrives Cleveland 8:40 p. m. This train stops at most intermediate stations to receive and discharge passengers, baggage, mail, express, milk and cream. It also carries a cafe parlor car serving meals and refreshments. It normally consists of four cars.

Three outbound trains are operated from Cleveland daily as follows:

Train No. 32, Cleveland to Wheeling, leaves Cleveland 8:00 a. m. and arrives Wheeling 1:25 p. m., stopping at nearly all intermediate stations. It handles passengers, baggage, milk and cream, newspaper packages, mail and express from and to all points where it is scheduled to stop. It also carries a cafe parlor car in which meals and refreshments are served. It normally consists of four cars.

Train No. 34, Cleveland to Wheeling, leaves Cleveland at 4:00 p. m. and arrives Wheeling 9:45 p. m. This train stops only at East 93rd Street, Kent and Congress Lake, north of Canton, but south thereof makes most station stops. It also connects with train No. 4 at Harmon where passengers destined to Zanesville and points north thereof are transferred. Train No. 34 also receives at Harmon passengers from No. 4 destined to Wheeling and intermediate stations. Mail, express, baggage, newspaper packages, milk and cream are also handled on this train, and it carries a cafe parlor car serving meals and refreshments. It normally consists of four cars.

Train No. 30, Cleveland to Canton, leaves Cleveland 5:20 p. m. and arrives Canton 7:25 p. m. It is gas-electric operated, and stops at all intermediate stations including commutation stops. It carries baggage, newspaper packages and express. It normally consists of two cars.]

Under this schedule the total number of inbound passenger trains annually is 1408 and the total number of outbound passenger trains annually is 1095, or an aggregate of 2503 trains per annum. The average number of cars carried per train is 3.3 cars.

In reference to Wheeling's station facilities, Wheeling has two passenger stations in Cleveland, the 93rd Street Station located at the intersection of Wheeling's tracks and East 93rd Street, about five miles from the Public Square, serving the southeast section of the City. The principal passenger station is the Ontario Street Station located near the terminus of Wheeling's line of railroad in Cleveland at the approximate intersection of Ontario Street and Huron Road, about fifteen hundred feet from the center of the

Public Square. This station serves Cleveland's downtown section.

Taking the months of June and December, 1928, to obtain a fair average of Wheeling's outbound and inbound revenue passengers at its Ontario Street Passenger Station the total outbound revenue passengers during June, 1928, was 3807, and during December, 1928, was 3960, or a two months average of 3883 passengers, which multiplied by twelve produces an annual figure of 46,596 outbound revenue passengers, which I consider representative as an annual figure. The total inbound revenue passengers arriving at the Ontario Street Station during June, 1928, was 3959, and during December, 1928, was 3970, an average for the two months of 3964, which when multiplied by twelve gives 47,568 inbound revenue passengers for the year 1928. Based on these figures the total inbound and outbound revenue passengers who used this station during 1928 was 94,164, exclusive of passengers handled by special excursion trains. Wheeling carried a total of 283,054 revenue passengers in 1928, 33.26% of whom used the Ontario Street Station.

American Railway Express Company's records showed for the thirteen days from January 2nd to January 14th, 1929, a representative period, that the total number of outbound shipments was 3524 pieces with an aggregate weight of 171,482 pounds, or an average of 271 pieces per day, averaging an aggregate weight of 13,139 pounds. Inbound shipments are estimated to be the same. On this basis the total estimated number of express packages handled annually at the Ontario Street Station amounts to 197,830 express shipments of an aggregate weight of 9,629,430 pounds.

The United States Post Office estimates that during 1928 the Ontario Street Station handled out 652 tons and handled in 560 tons of mail, a total of 1212 tons.

The annual outbound passenger revenues at the Ontario Street Passenger Station during the six years ended December 31st, 1928, were

1923	$130,589.69
1924	130,605.59
1925	115,074.60
1926	100,587.84
1927	82,558.53
1928	82,030.83

The Ontario Street Station outbound passenger revenue for the year 1928 was 26.12% of the year's total revenue

from all passengers of $314,060.82. Motor vehicle competition was the principal cause of the decrease in passenger revenue at the Ontario Street Station during the above six year period, but this decrease will probably not continue, or, if it does, it will continue at a very much lower rate than in the past six years, the recession of 1928 over 1927 being small. In the future, if accommodations are satisfactory, Wheeling should handle at least about the same number of passengers as during 1928.

[I have here a detailed map of Cleveland and surrounding territory marked "Applicant's Exhibit No. 2," which I now offer in evidence. Applicant's Exhibit No. 2, Witness Durham, was received in evidence. This is a detailed map of Cleveland and surrounding territory in Cuyahoga County. On this map I have caused to be outlined not only the lines of the applicant but also the lines of all other steam railroads serving Cleveland. The present lines of the applicant are shown in solid yellow, entering Cleveland from the southeast and proceeding in a general northwesterly direction to a point near the junction of Ontario Street and Huron Road just south of the triangular area marked "new union depot." The legend shows the colors used to denote the other steam railroad lines. I have also shown what are known as the rapid transit lines, which operate over the local street car lines to East 34th Street and from that point eastward over private right of way to serve the Shaker Heights section of Cleveland. These lines are projected eastwardly to Gates Mill Village and Pepper Pike Village. As shown by the map, the lines of steam railroads entering Cleveland are those of the applicant, the Baltimore & Ohio, the Erie, the Big Four, the New York Central, the Nickel Plate, and the Pennsylvania.

I have also shown on this map in a broken red and green line the proposed route which will be used by the trains of the New York Central, the Big Four and the Nickel Plate in approaching the new union depot from the east and within the limits of the Terminal area indicated by the letters W-X-Y.

According to the 1920 census the population of Cleveland was 796,841, and of Cuyahoga County 943,495. The last estimate of the Bureau of Census for Cuyahoga County was as of July 1, 1926, and shows an estimated population of 1,148,400. The latest estimate of the Bureau of Census for Cleveland was as of July 1, 1928, and shows an estimated population of 1,010,300.]

I have here a map showing Wheeling's property and lines of railroad northerly of Eagle Avenue in the City of

Cleveland, Ohio, marked "Applicant's Exhibit No. 3" which I now offer in evidence. Applicant's Exhibit No. 3, Witness Durham, was received in evidence. Exhibit No. 3 shows Wheeling's lines north of Eagle Avenue, including its Ontario Street Passenger Station and tracks leading thereto. It shows the property of Wheeling from Huron Road to Eagle Avenue in Cleveland, including lands owned by Wheeling north of Eagle Avenue, outlined in yellow, having an area of 74,780 square feet, and lands leased by the Company, outlined in red, having an area of 5677 square feet. Wheeling's Ontario Street Passenger Station is located partly on leased land, the lease running to 1991, and partly on lands owned by the Company. Exhibit 3 shows existing at present one main track 1035 feet in length and one siding track 396 feet in length, on a right of way terminating substantially at the junction of Huron and Ontario Streets. The broken red and blue lines represent tracks heretofore removed. The existing tracks of Wheeling shown on Exhibit 3 are now used only to serve the Ontario Street Passenger Station but prior to May, 1928, they were used to some extent to serve concerns receiving packing house products, a small amount of coal and some miscellaneous commodities, and they served Terminals in handling waste materials during its excavation work. The tracks are no longer being used for these purposes, as the buildings formerly occupied by the commission houses along Ontario Street have been razed by Terminals and Terminals has discontinued shipping its waste materials via Wheeling.

The 5677 square feet of land north of Eagle Avenue is held by Wheeling under a 99 year lease from April 1, 1892, between Ann Walworth, lessor, and Cleveland & Canton Railroad Company, Wheeling's predecessor, as lessee, said lease providing for rental readjustments every ten years on a 5% reappraisal basis of the land alone, exclusive of buildings, but plus taxes and assessments. The last reappraisal agreement provides for an annual rental of $6000 for the ten years commencing April 1, 1922.

I have here a copy of this lease and a copy of the last readjustment agreement dated April 1, 1922, which I now offer in evidence as "Applicant's Exhibit No. 4." Applicant's Exhibit No. 4, Witness Durham, was received in evidence.

[I now offer in evidence a booklet containing six photographs, four of the exterior and two of the interior of Wheeling's Ontario Street Passenger Station, and two prints, one showing the first floor or Ontario Street level

plan, the other a section through the stairwell leading from the Ontario Street level to the track level, marked "Applicant's Exhibit No. 5," Witness Durham. Applicant's Exhibit No. 5 was received in evidence.

Photograph No. 13 of Exhibit No. 5, taken in July, 1928, is an end and front view of Wheeling's station building taken from across Ontario Street looking in a southerly direction. The building is of wood and stucco construction with two and a half stories above the Ontario Street level. The floor at the Ontario Street level includes the main waiting room, baggage room and offices of the general passenger agent, as shown on first floor plan which is part of Exhibit 5. Photograph No. 1894 in Exhibit 5, taken April 6th, 1928, an end view of the station taken from the northerly end looking in a southeasterly direction, shows a passenger train standing on the track and gives a fair idea of facilities at the track level. Attention is called to the partial section of the stairs included in this exhibit, which is designed to show the stairwell as if the building were cut in two and it were looked at from the same point from which the photograph was taken. Wheeling's main track terminates approximately at the point where the photograph shows a stick of timber or cross-tie across the tracks in the middle foreground. The track extending northerly therefrom is a temporary one laid for the purpose of moving a locomotive crane from Wheeling's main track up into Ontario Street for the use of Terminals. Photograph No. 12, taken in July, 1928, is an end and front view of the station at the Ontario Street level, taken from across Ontario Street looking in a northwesterly direction and showing the Terminal Tower to the right. Photograph No. 9, taken in July, 1928, is a rear view of the Ontario Street Passenger Station looking northerly from across Canal Road, showing the station platform and main track on which the train shown in Photograph No. 1894 was standing. The street to the right is Ontario Street and the trestle construction to the left is one built by Terminals for the temporary diversion of a portion of Ontario Street north of the station. This photograph shows the 25-foot climb from the station platform and track level to the Ontario Street level. Photograph No. 14, taken in January, 1928, is an interior view of the station showing the north end of the waiting room and top of the main stairwell. Photograph No. 15, taken in January, 1928, is an interior view of the station showing the south end of the waiting room and top of the main stairwell. In connection with the interior photographs, attention is called to the first floor

plan showing waiting room, baggage room, ticket office and general passenger agent's office, and further attention is called to the print showing partial section of the main stairs by which passengers move between the track level platform and Ontario Street, this stairway being 25 feet 3 inches in height and having 41 risers, as shown by the last print in the booklet.

The Ontario Street Station waiting room accommodates fifty people and is inadequate on many occasions, particularly during holiday seasons or when handling excursions, at which times passengers have been required to stand on the sidewalk while waiting for trains, a great inconvenience particularly during inclement weather. Toilet facilities are very limited and inconvenient, causing frequent complaints, particularly on occasions of heavy travel. There are no modern conveniences, such as news stands, restaurant, lunch counter, regular and dependable porter service, covered platform between waiting room and trains or covered taxi cab stands. The absence of porter service is a serious hardship on elderly or feeble persons who find it very difficult to carry hand luggage to or from trains by way of the 41-step stairway which must be traversed in moving between the station platform and Ontario Street. The necessity for going onto the sidewalks and up along the street to obtain taxi cab service is especially inconvenient during inclement weather when taxi cab service is most desirable. There is no passenger elevator service.

Mail sacks, parcel post packages and newspaper bundles are delivered to the trains by a chute at the south end of the station where delivery trucks must back across the sidewalks, thus creating a hazard and serious interference with pedestrian travel. The station provides track space for only one train, a great inconvenience, especially to passengers arriving on train No. 37 at 7:40 a. m. since the single track space is then occupied by train No. 32 departing at 8:00 a. m., in consequence of which train No. 37 must stop considerably south of the station and its passengers must walk several hundred feet alongside of the track without the protection of a shed. Facilities for handling baggage are obsolete and entirely inadequate. The Ontario Street Passenger Station was constructed during Wheeling's receivership in 1909 under a temporary permit from the City of Cleveland granted in late 1908, on condition that the building would be removed one year from date of completion. I now offer in evidence a photostatic copy of such permit from the City of Cleveland, marked Applicant's Exhibit No. 6, Witness Durham. Applicant's

Exhibit No. 6 was received in evidence. This permit contains the following provision:

> "This is to certify that the within detailed statement of specifications and a copy of the plans relating thereto, have been submitted to the Inspector of Buildings and are hereby approved on condition that building is to be taken down at the end of one year from date of completion."

Wheeling's applications herein state that its Ontario Street Station is approaching the end of its structural life. From time to time I have observed that the building is dilapidated and inconvenient, and my attention has frequently been called to these conditions by oral reports of the traffic department, particularly by the general passenger agent, relating to patron's complaints. The building's physical condition and the necessity for substituting something better has been frequently mentioned in oral reports to me by our bridges and buildings department, attention being called to the fact that the building existed by virtue of the temporary permit and was subject to removal by order of the City of Cleveland. In July, 1928, the engineer of maintenance of way and structures at my request caused an examination of the building to be made by two engineers under his direction. I now offer in evidence their report, marked Applicant's Exhibit No. 7—Witness Durham. Applicant's Exhibit No. 7—Witness Durham, was received in evidence.

In this report the engineers found that the wooden pile foundations are probably so decayed as to be a hazard to the safety of the structure; that the concrete retaining wall has settled and cracked; that the building is unstable because of its light construction, particularly in high winds, which about eleven years ago caused the building to buckle out on the south side; that the exterior stucco and all outside doors, window casings and panel belting and flooring on the mezzanine and first floor should be renewed and the building should be painted both inside and outside; that the baggage elevator is practically worn out and is a hazard; that the plumbing is in very bad condition; that in the engineers' opinion in about three years the station will be a hazard which Wheeling cannot safely continue. Photograph No. 1893 of Exhibit No. 7 shows an end and front view of the station taken from the southerly end looking north, and shows some buckling just beyond the first or baggage room door. Photograph No. 1896 taken from the track level at the southerly end looking north

shows the chute from the street to the track level which handles mail and a considerable amount of baggage to outgoing trains. The canopy or shed on the southwest side of the building, shown in the photograph, is in bad condition. This canopy does not extend out to cover the trains. Photograph No. 1895 taken from the northerly end looking in a southeasterly direction, shows the other end of the canopy shown in Photograph No. 1896; also a portion of the lower part of the station built out of brick and the condition of the walls nearer the building along Ontario Street. Photograph No. 1886 is an interior view of the express room on the track level, showing the means used as temporary support. The piling through the center of this room with the shores underneath were placed to support the upper floor which started to come down several years ago. These supports interfere with the use of the space, making that part of the building of little use. Photograph No. 1891 shows a section of the basement and two temporary supports placed to support the load on the upper floors. Photograph No. 7 shows the cracked retaining wall on the northeasterly side of the station next to Ontario Street on the inside of the building in the basement. Photograph No. 8 is a basement view showing the retaining wall along Ontario Street where the same is cracked in another place. Photograph No. 9 shows part of the concrete foundation and retaining wall along Ontario Street where it is cracked in another place. These photographs show the retaining wall which supports the building and the weight of the street, on the Ontario Street side. Photograph No. 10 shows the interior of the waiting room at the Ontario Street level. Slightly to the left of the center and in the rear of the photograph there appear two iron rods which are temporary braces, of which there are a large number in the building, placed a few years ago, to hold it together. Photograph No. 11 shows the old file room on the second floor above street elevation, and shows the same tie rods placed to hold the building together, as well as some of the wooden bracings which it has been necessary to put in from time to time. It was found necessary to remove the files from the building because of excessive weight, and before removal the space on the second floor was limited to storage purposes because of the presence of the tie rods and wooden braces. When it became too weak for storage, it could be used for nothing. The attic is unusable, being poorly lighted, of weak construction in the first instance, and subject to the same disability as the sec-

ond floor for storage purposes. Neither the attic nor the second floor are used for any purpose.]

I have here a "Statement of Approximate Expenses for Maintenance and Operation of Present Ontario Street Passenger Station," marked Applicant's Exhibit No. 8, Witness Durham, which I now desire to offer in evidence. Applicant's Exhibit No. 8 was received in evidence. This statement does not include interest, carrying charges or depreciation on buildings or tracks, or the land north of Eagle Avenue now owned by the applicant and required for station purposes. The statement shows an item of $6,000 for rental to cover the rental under the Walworth lease, and there is no other charge on account of land except taxes. If Wheeling should decide or be required to continue to use its property north of Eagle Avenue for common carrier services it would be necessary, in my opinion, to replace the present Ontario Street Station within the next three or four years with a building of approximately the same cubical capacity, of fire-proof construction, as required by the Cleveland Building Code, and with some changes of design to better accommodate the public and Wheeling's employes who use the station.

I have here an exhibit showing the estimated cost of a new building to replace the present Ontario Street passenger station, marked "Applicant's Exhibit No. 9, Witness Durham," which I desire to offer in evidence. Applicant's Exhibit No. 9 was received in evidence. Wheeling's Ontario Street Passenger Station site is located within the inner fire zone of the City of Cleveland requiring a fire-proof building. I have another statement showing the "Estimated operating and carrying charges for operation of the tracks and new station," marked "Applicant's Exhibit No. 10, Witness Durham" which I now offer in evidence. Applicant's Exhibit No. 10 was received in evidence. This statement does not include interest, carrying charges on land now owned and used for station purposes, or depreciation on station buildings and tracks. The proposed building represents an estimated expenditure of $170,000 which includes $4,000 for demolishing present building and clearing site, chargeable to operating expenses, leaving an investment account charge of $166,000. If Wheeling secures passenger station facilities and service elsewhere in this vicinity it would have no need for its right of way north of Eagle Avenue for common carrier service, since as explained before its only use is to serve its Ontario Street Passenger station.

Wheeling has entered into an option contract with Building providing that during a period of five years Wheeling shall have the option to require Building to pay Wheeling $1,600,000 for the conveyance to Building of Wheeling's land owned in fee north of Eagle Avenue, the assignment of the leasehold interest in the 5677 square feet of land adjoining its own lands, and the quit-claiming of Wheeling's reversionary rights in the streets upon which Wheeling's lands abut. If the Commission grants authority to abandon Wheeling's property north of Eagle Avenue, Wheeling proposes to exercise this option promptly and carry out its terms as soon as possible after removing from these lands all rails and other property worth salvaging. A copy of this option contract dated December 7th, 1928, marked "Applicant's Exhibit No. 11, Witness Durham," is now offered in evidence. Applicant's Exhibit No. 11 was received in evidence.

The passenger facilities and service in the new union depot of Terminals are available to Wheeling. This depot, now under construction, is located about 1500 feet north of Wheeling's Ontario Street passenger station as shown by a map of the downtown section of Cleveland, which I now offer in evidence, marked "Applicant's Exhibit No. 12, Witness Durham." Applicant's Exhibit No. 12 was received in evidence. Exhibit 12 is drawn on the scale of one inch to two hundred and fifty feet, and superimposed thereon are the proposed tracks of Terminals and the location in outline of the new union depot of that company in order to show its proximity to Wheeling's Ontario Street Station.

I have here an aerial photograph marked "Applicant's Exhibit 13, Witness Durham," of the downtown district of Cleveland, which I now offer in evidence. Applicant's Exhibit 13 was received in evidence. On Exhibit 13, taken June 16th, 1928, are superimposed the proposed tracks of Terminals and the names of the principal streets in this portion of Cleveland. A comparison of this photograph with Exhibit 12 will identify any one of the principal buildings shown in the photograph. Starting at the righthand center of Exhibit 13 will be seen lines representing the proposed tracks of the east approach of Terminals. At the extreme right where these tracks are shown excavation work has already started. Following these tracks towards the left and immediately under the words "Ontario Street" and the initials "W. & L. E. Sta." appears outlined in black dash and dotted lines the property of Wheeling including the property leased from Walworth. Following the line of Eagle Avenue at the right and somewhat above the tracks

of Terminals the easterly line of Wheeling's property along Eagle Avenue is shown. It is the property lying west of and to the left of that line that Wheeling is asking to abandon. Exhibit 13 illustrates well the location of Wheeling's property with respect to Terminals' project and the necessity for Terminals' getting through at that particular point in order to carry out its plan. The Exhibit also shows the proximity of Wheeling's Ontario Street Passenger Station to the Public Square, which will be seen to the left and just above the shadow cast by the terminal tower. The proximity of the new station to the Public Square and the downtown section is also well illustrated. The lower left-hand corner of Exhibit 13 shows the location of the Superior Avenue Station of Erie which Wheeling is now asking to use temporarily during the construction period of the new union station. The building marked "Cleveland" with the arrow painted on its roof is the Cleveland Hotel, and just to the right of that and attached to it is the Terminal Tower building. Immediately above and slightly to the right of that building is the Public Square.

[From Wheeling's Ontario Street Station to the Superior Avenue Station of Erie is about 3600 feet, following the route by roads and streets which passengers would have to travel. The airline distance between Wheeling's Ontario Street Station and the Superior Avenue station of Erie scales on the map 1550 feet.

I also have another photograph, being an oblique airplane view of the downtown district of Cleveland, showing from a different angle the relation of Wheeling's Ontario Street Station to the new union depot and the principal streets and buildings, particularly east of the new union depot, marked Applicant's Exhibit No. 14—Witness Durham, which I now desire to offer in evidence. Applicant's Exhibit No. 14 was received in evidence. The terminal tower appears just above the building marked "Cleveland Hotel" on Exhibit No. 14, which was taken on August 19th, 1928. Just below and to the right of the terminal tower is shown the construction work on the new terminal station including the extension of Prospect Street through to Superior Avenue. Just slightly to the right of the terminal tower appears the temporary diversion of Ontario Street, and just above that diversion appears the excavation work of Terminals on its easterly approach. Just to the right of that appears Wheeling's Ontario Street Station. To the left of the Cleveland Hotel appears the Public Square, off of which, leading through the center of the photograph, will

be noted Euclid Avenue, and Superior Avenue. Exhibit 14 gives an excellent view of the situation in the vicinity of the new terminal project and the relationship of Wheeling's property to that enterprise.]

Five resolutions were adopted by Wheeling's Board of Directors at its meeting held July 20th, 1928, and five modifying resolutions were adopted at its meeting of November 23rd, 1928, one authorizing the execution of the user contract with Terminals, Exhibit 2 attached to our application in Finance Docket 7298, one the contract with Erie, Exhibit 3, Part 1 attached to our application in Finance Docket 7298, and the contract with Big Four, Exhibit 3 Part 2 attached to our application in Finance Docket 7298, one the option contract, Exhibit 11, with Building, one an indemnifying contract with Terminals, Exhibit 3, Part 3 attached to our application in Finance Docket 7298, one authorizing the vacation of the right of way and other property of the applicant northerly of Eagle Avenue, subject to the approval of the Interstate Commerce Commission and of the Public Utilities Commission of Ohio, if required, and one authorizing me to sign, verify and file applications and returns to the questionnaires in these proceedings. I have here additional copies of these contracts marked respectively Applicant's Exhibits 15, 16, 17 and 18, which I now offer in evidence. Applicant's Exhibits 15, 16, 17 and 18, Witness Durham, were received in evidence. Copies of the resolutions adopted at the July 20th, 1928, meeting of Wheeling's directors I now desire to offer in evidence marked "Applicant's Exhibits 19, 20, 21, 22 and 23, Witness Durham." Applicant's Exhibits 19, 20, 21, 22 and 23 were received in evidence.

I further desire to offer in evidence copies of the resolutions adopted at the meeting of November 23rd, 1928, marked "Applicant's Exhibits 24, 25, 26, 27 and 28, Witness Durham." Applicant's Exhibits 24, 25, 26, 27 and 28 were received in evidence.

[I have here a copy of applicant's application filed with the Public Utilities Commission of Ohio on December 12th, 1928, for authority to abandon its right of way and property northerly of Eagle Avenue, marked Exhibit No. 29, and a certified copy of the order of the Commission dated December 12th, 1928, dismissing the application for want of jurisdiction, marked Exhibit No. 30, both of which I now offer in evidence. Applicant's Exhibits 29 and 30, Witness Durham, were received in evidence.

I have here a copy of the map attached as Exhibit 1 to the applications filed in Finance Dockets 7298 and 7299, showing the track connections between Wheeling's main line and Erie's Superior Avenue Station, and between Wheeling's main line and Terminals' new union depot, which I now desire to offer in evidence, marked Applicant's Exhibit No. 31, Witness Durham. Applicant's Exhibit 31 was received in evidence.

Wheeling proposes to operate temporarily into and out of Erie's Superior Avenue Station with its passenger trains in the following manner: Wheeling's passenger trains will leave Wheeling's main track at point A shown on map Exhibit No. 31, and will operate over a portion of an industrial siding of Wheeling for a distance of 612 feet to a point of connection with the interchange track of Erie shown at point B; thence for a distance of 2093 feet over this interchange track of Erie to a point of connection with the connecting track of Erie at point C; thence a distance of 1824 feet over this connecting track to a point of connection with the eastward main track of Big Four shown as point D; thence a distance of 4099 feet over this eastward main track to point F; thence over a connecting track of Big Four (F-G) of the length of 81 feet to a connection with the terminal tracks of Erie at point G, and thence over these terminal tracks into the Superior Avenue Station of Erie. There are two of these terminal tracks with a cross-over aggregating 1446 feet in length. Under the Big Four contract Wheeling is given the right to operate on the eastward main track of Big Four as far as point J, which is the southerly line of St. Clair Avenue, and over Big Four's connecting track H-K of a length of 380 feet, which connects with the terminal tracks of Erie at point H. Outbound movement will be in a reverse direction from the Erie terminal tracks H-G over connecting tracks of Big Four, G-F; over the eastward main track of Big Four from F to E; over the cross-over track of Big Four, E to L, of a length of 162 feet; thence over the west main track of Big Four from point L to M a distance of 1830 feet; thence over a cross-over of Big Four, M-N, and thence to the connection between Big Four's tracks and Erie at point D and over the connecting and interchange tracks of Erie and industrial siding of Wheeling to the main line of Wheeling at point A.

I have here a booklet containing four photographs of the exterior and one photograph of the interior of Erie's Superior Avenue Station and one print showing the floor

plan of the station, marked Applicant's Exhibit No. 32—Witness Durham, which I now desire to offer in evidence. Applicant's Exhibit No. 32 was received in evidence. Referring to the photographs and prints introduced as Exhibit 32, by comparing the print which is part of this Exhibit with the print (attached to Exhibit 5) showing the waiting room of Wheeling's Ontario Street Station, Erie's passenger station is much more commodious than Wheeling's Ontario Street Passenger Station as it has a waiting room 59½ by 43 feet with a total area of 2558 square feet, as compared with Wheeling's station waiting room 27 by 54 feet, having an area of 1458 square feet which includes space occupied by the stairwell and ticket office. Erie's station has a lunch counter while Wheeling's station has neither lunch counter nor restaurant. Erie's station tracks are covered by a roof; there is a hard surface platform, much larger and in better condition than Wheeling's. There is a news stand at Erie's station and none at Wheeling's. There is also regular and dependable porter service and none at Wheeling's. At the Erie station there is a Travelers' Aid attendant and women's rest room, both lacking at Wheeling's. At Erie's station taxi cab and transfer buses may be boarded on the platform level without leaving shelter, which is untrue of Wheeling's. The distance from Erie's station to the center of the Public Square is approximately 2100 feet as compared with 1650 feet from Wheeling's. Erie's accommodations for mail, express, baggage and milk are more adequate than the corresponding accommodations of Wheeling. From photograph No. 16, an interior view of Erie's Superior Avenue Station, it will be seen that the waiting room is larger and affords better accommodations than the Wheeling station. Photograph No. 20 is a general view of Erie's Superior Avenue Station showing train shed and grounds, including platform. To the right appears a covered stairway leading up to Superior Avenue where street cars may be boarded under cover, the car line being at the lower level of the Superior Avenue high level approach and under cover. Photograph No. 20 also shows in the background the approach to Superior Avenue. Taxi cabs and buses are boarded at the point where a bus is standing in the middle ground of the picture. Photograph No. 21 is taken from the same side or end of the station as Photograph No. 20 but closer, giving a better idea of the surroundings and proximity of the car line, the entrance to which is just above where a man is shown walking down the ramp. Photograph No. 22 is taken

from a slightly different angle but from the south end of the station, the same as Photographs 20 and 21 and is closer, showing track arrangement and the level at which taxi cabs and buses may be boarded. The two tracks running under the shed attached to the station are the Erie terminal tracks referred to in connection with Exhibit 31. Photograph No. 23 shows the portion of the covered section of the platform looking from north to south, and shows also track entrance to the station and illustrates accommodations in that respect. The shed in right background is the B. & O. station shed across the street. Erie's Superior Avenue station is adequate to accommodate the trains and passengers of both Erie and Wheeling, with space for two trains but requiring possibly a slight change in one or two of Wheeling's schedules to avoid conflict with some of Erie's trains, not over ten minutes in any case. The waiting room and other facilities are adequate to accommodate the passengers of both companies under present train schedules.

The intervening track between Wheeling's main line at Mahoning Avenue and the Superior Avenue Station of Erie has sufficient capacity to enable Wheeling to operate over them jointly with Big Four and Erie without inconvenience to any one of the three, as shown by check of train movements. Big Four does not use this section of the track for regular service except switching and terminal service, and only Erie's passenger trains use the same. A profile of the tracks intervening between Wheeling's main line at Mahoning Avenue and Erie's Superior Avenue Station which I have here, marked Applicant's Exhibit No. 33—Witness Durham, shows that Wheeling's siding track has a maximum curvature of 16°; Erie's track, a maximum curvature of 9° 30′; Big Four's track, a maximum curvature of 5° 15′. Applicant's Exhibit 33 was received in evidence. A profile of the main track of Wheeling from its Ontario Street Passenger Station to Erie's interchange track, approximately at Mahoning Avenue, which I have here, marked Applicant's Exhibit No. 34—Witness Durham, shows that these tracks have a maximum curvature of 12° 30′. Applicant's Exhibit No. 34 was received in evidence.

An estimate of the cost of operating passenger trains from Mahoning Avenue to Wheeling's Ontario Street Passenger Station as compared with the cost of operating similar trains from Mahoning Avenue to Erie's Superior Avenue Station over the tracks shown on Exhibit 33, shows

$52.40 additional cost per month to operate all Wheeling's passenger trains into Erie's Superior Avenue Station, the increase being largely due to the fact that the distance from Mahoning Avenue to Erie's Superior Avenue Station is 8600 feet as compared with 5400 feet from Mahoning Avenue to Wheeling's Ontario Street Station. The difference is net and is due to the payment of certain crews. Operating conditions are a little more favorable, there being less grade, less rise to overcome between Mahoning Avenue and Erie's station than between Mahoning Avenue and the Ontario Street Station, requiring less fuel for the former. Economies effected by Wheeling through operating into Erie's Superior Avenue Station during the period intervening between Wheeling's abandonment of the Ontario Street Station, if permitted by the Interstate Commerce Commission, and the date when Terminals begins to furnish Wheeling station facilities and service in the new union depot, result because Terminals is obligated to furnish Wheeling, free of cost, passenger service in Erie's Superior Avenue Station during this intervening period, thereby saving Wheeling the operating cost of its Ontario Street Passenger Station which, as shown by Exhibit 8, is about $24,113.58 per annum, from which, however, must be deducted $600.00 per annum to cover the rental of an office for the general passenger agent who is now accommodated in Wheeling's Ontario Street Station. The net saving therefore to Wheeling will be about $22,884.78 annually, arrived at as follows:

Estimated cost of operating Ontario Street Station, per annum		$24,113.58
Less estimated excess cost of operating trains to Superior Avenue Station, per annum	$628.00	
Office rental for general passenger agent, per annum	600.00	1,228.80
Net economy for use of Superior Avenue Station		$22,884.78

The foregoing figure does not include any item representing yield or return to Wheeling on the net proceeds of the sale of Wheeling's land north of Eagle Avenue.

H. D. Jouett, Chief Engineer of Terminals, furnished me the plans of the new union depot, consisting of five sheets, which I now desire to offer in evidence as Applicant's Exhibits 35, 36, 37, 38 and 39, Witness Durham. I also have here an artist's sketch of the union depot, pre-

pared to show its conveniences and its relation to Wheeling's Ontario Street Station, marked Applicant's Exhibit 40, Witness Durham, and a photograph of five sketches of interior views of the new union depot marked Applicant's Exhibit 41. Applicant's Exhibits 35, 36, 37, 38, 39, 40 and 41 were received in evidence.

Referring now to Exhibits 35 to 41 inclusive, to aid in describing the new depot and its accommodations, the new station will be a through, two-level type, with all tracks on the lower level and waiting rooms, baggage, mail, express and other facilities on an upper level. With exception of street entrances the station facilities will all be below street level. Huron Road and Prospect Avenue extensions at elevation 100, lying between Ontario Street and Superior Avenue, will be connected by cross streets, while the street level at the Public Square to the north of the building is at level 85. Exhibit No. 38 shows the two entrances to the main concourse leading off from Prospect Avenue; the one from the westerly side being by ramp to the main concourse; the center one being by stairways; and another entrance from the easterly side of the station leading down from the corner of Ontario Street and Prospect Avenue by ramp, which ramp is well illustrated on Exhibit No. 40. Exhibit No. 37 shows the plan at level 85 or the level of the main or Public Square entrance. This exhibit shows both east and west ramps leading to the steam concourse and east and west ramps leading to east and west traction concourse. On this print in solid white is level 72.5, while the 85-level is shown by hatching. Thus there are four ramps connecting the main entrance at elevation 85 to the traction concourse and ticket lobby at elevation 72.5. To the right and left of the portion marked "upper part east traction concourse" and "upper part west traction concourse" are shown the ramps leading down from Prospect Avenue on the west side and from the corner of Prospect Avenue and Ontario Street on the east side. The top photograph on Exhibit No. 41 shows the appearance of the portico entrance of the station building looking south from the Public Square entrance. A portion of the floor space at the 85 elevation is for stores, called shops on the plan. There is also space shown for a bank. The concourse, ticket lobby and all other station facilities, except tracks, will be at elevation 72.5, or slightly higher, and are shown substantially on Exhibit No. 36. Thus the main lobby level will be only 12.5 feet below the main entrance on the Square. This exhibit shows the main station facilities which, exclusive of

baggage and express space, cab stand and auxiliary equipment, will occupy a central structure about 640 feet long by 340 feet wide, the main feature of which will be a central public space about 450 feet long and from 91 to 154 feet wide, to accommodate steam road passengers and two side concourses 59 feet wide for the use of traction passengers. The public space for steam passengers will be divided into three units, an entrance lobby 154 feet wide and 75 feet long at the foot of the entrance ramps, a ticket lobby 103 feet long by 91 feet wide, and a concourse 235 feet long by 120 feet wide.

The stairways to the steam road platforms will be located on the north and south axis of this concourse, while on the west side two sets of doorways will communicate with a waiting room 163 feet by 55 feet 2 inches. To the east and west of the main station structure there will be large wings, that on the west to accommodate a baggage room and large cab stand, which will be under cover, and that on the east, a restaurant and lunch room, barber shop, employes' facilities, mail and express room. Other facilities on this floor are shops, parcel, baggage and checking rooms, rest rooms, and telephone room.

By referring again to Exhibit No. 41 there will be seen sketches illustrating the traction concourse looking north from a point under the south line of Prospect Avenue; the ticket lobby looking south from the foot of the entrance ramps; the steam concourse looking north from a point under the north line of Huron Road; the waiting room looking north from a point under the north line of Huron Road; all of which are to be located at 72.5 elevation. The general arrangements of the tracks which are located at elevation 52 are shown on Exhibit 35.

Exhibit No. 39 shows a series of sections; the first one being on the main axis of the terminal looking west; second, through the west ramp looking west; third, through the west traction concourse looking west; fourth, along center line of Prospect Avenue, looking north; fifth, through station areas between Prospect Avenue and Huron Road, looking north. These sections give a clear idea of how the steam and traction ramps lead down from the Public Square into the steam and traction concourses.

Exhibit No. 40 is an artist's sketch illustrating the exterior and interior of the new union depot as seen from the south side. Thus it shows in the immediate foreground the station tracks and coach yard tracks which are at the 52-foot level, and immediately beyond them a portion of

the steam concourse, waiting room, dining and lunch rooms, barber shop, parcel room, ticket lobby, taxi stand and baggage room, all of which are at the 72.5 level. This sketch also shows the ramps to the baggage room and taxi stand near the left hand margin, a ramp to the mail and express room in the right foreground, and a ramp to the concourse level from the corner of Prospect Avenue and Ontario Street, to which I have heretofore referred. In the lower right hand corner of the sketch is shown our Ontario Street station, and the sketch shows how the easterly approach tracks of the Terminals must cross our company's land and run under the site now occupied by our station. In the background will be noted a number of principal office and public buildings and the docks on the lake front.

One of the principal advantages to our patrons of entering this station lies in the fact that it will enable them to make direct connections in the same station between our company's trains and the trains of the New York Central, the Nickel Plate and the Big Four. This, of course, means a considerable saving in time as well as some saving in expense of taxi service and baggage transfer charges. This is of importance also because the natural train connections are quite close. Assuming that the present schedule of our company and of the New York Central, the Nickel Plate and the Big Four are maintained after operation into the union depot begins the following connections will be available to our incoming passengers:

Passengers from our train No. 37 arriving Cleveland 7:40 a. m. may connect with the following trains:

Via the New York Central No. 60—8:15 a. m. for Buffalo and points east.

Via New York Central No. 7—8:00 a. m. for Chicago via Old Road.

Via New York Central No. 19—8:30 a. m. for Chicago.

Via Big Four No. 19—8:30 a. m. for Columbus and Cincinnati.

Via Big Four No. 119—8:40 a. m. for Indianapolis and St. Louis.

Via Nickel Plate No. 6—8:55 a. m. for Buffalo and New York.

Via Nickel Plate No. 1—9:05 a. m. for Chicago.

Passengers from our train No. 31 arriving Cleveland 9:55 a. m. may make connections with the following trains:

Via New York Central No. 56—10:10 a. m. for Buffalo and points east.

Via New York Central No. 52—12:53 p. m. for Buffalo.

Via New York Central No. 23—11:59 a. m. for Chicago via Norwalk.

Via New York Central No. 251—12:20 p. m. for Detroit.

Via New York Central No. 151—12:27 p. m. for Chicago.

Via Big Four No. 33—12:00 noon for Columbus and Cincinnati.

Via Big Four No. 3—12:50 p. m. for Indianapolis.

Via Nickel Plate No. 2—12:40 p. m. for Chicago.

Passengers from our train No. 33, arriving Cleveland 1:25 p. m. may make connections with the following trains:

Via New York Central No. 612—2:30 p. m. for Buffalo.

Via New York Central No. 44—4:00 p. m. for New York.

Via New York Central No. 150—5:28 p. m. for Boston.

Via New York Central No. 4—6:00 p. m. for New York and Boston.

Via New York Central No. 6—6:50 p. m. for New York.

Via New York Central No. 81—2:40 p. m. for Toledo and Detroit.

Via New York Central No. 609—3:45 p. m. for Chicago.

Via Big Four No. 35—3:30 p. m. for Columbus and Cincinnati.

Via Nickel Plate No. 9—6:05 p. m. for St. Louis.

Via Nickel Plate No. 8—6:00 p. m. for Buffalo and New York.

Passengers arriving on our train No. 35, due in Cleveland 8:40 p. m. may make the following connections:

Via New York Central No. 10—8:50 p. m. for Boston.

Via New York Central No. 12—9:00 p. m. for New York.

Via New York Central No. 89—11:40 p. m. for Chicago.

Via Big Four No. 5—12:20 a. m. for Columbus and Cincinnati.

Via Big Four No. 39—2:00 a. m. for St. Louis.

Via Nickel Plate No. 2—9:00 p. m. for Buffalo and New York.

Via Nickel Plate No. 5—11:30 p. m. for Chicago.

Similarly, passengers arriving in Cleveland on New York Central train No. 7 at 7:15 a. m. and No. 90 at 7:40 a. m. may make convenient connection in the union depot with our train No. 32, leaving at 8:00 a. m. The New York Central train No. 81 due in Cleveland 2:23 p. m. affords connection with our train No. 34 leaving at 4 p. m.

Passengers from Big Four trains arriving in Cleveland at 7:30 a. m., 7:47 a. m. and 3:55 p. m. may also make convenient connections with our trains.]

The total number of trains operated into and out of Cleveland by the New York Central, Nickel Plate and Big Four during the period of 24 hours is as follows:

New York Central—eastbound 17; westbound 17;			total 34
Big Four			total 14
Nickel Plate	eastbound 3;	westbound 4;	total 7
or a total of all trains of			55

These three proprietary lines, so-called, are already under contract with Terminals to use its depot when constructed, having obtained in Finance Docket 1237 a certificate of public convenience and necessity to acquire control of Terminals and erect the union depot. [In addition to the connections which can be made with these three steam railroads in the union station a passenger may connect with the rapid transit trains using this station operating to points on the Heights, the rapid transit system being shown on Exhibit No. 2 and operating at present 89 trains daily from the Heights section to the business section of Cleveland and the same number outbound. Between 7:30 a. m. and 9 p. m. the number of these trains arriving at and departing from the Square is 68, this being the period during which our trains arrive and depart. A passenger arriving on one of our trains into the new union depot can go directly, without emerging on the street, to the following buildings, either already constructed, in process of construction, or planned as a part of the terminal development:

1. The Terminal Tower Building, constructed and now under occupancy, containing approximately 520,000 square feet of office space and approximately 40,000 square feet of shopping area. About 86% of the office space is already leased, and the Chamber of Commerce has its offices in this building, together with fine club rooms.

2. The Cleveland Hotel, having approximately 900 guest rooms. An addition will probably soon be built having approximately 700 rooms and enlarged public space.

3. The Medical Arts Building, under construction at the corner of Ontario Street and Prospect Avenue extension, will house tenants of the medical and dental profession, having a total area of approximately 189,000 square feet, which will be ready for occupancy about July 1, 1929, and is 30% leased.

4. Builders Exchange Building, under construction at approximately the corner of Huron Road extended and Ontario Street, will house tenants engaged in the construction and equipping of buildings. It will have an office area of approximately 176,000 square feet, of which 15% is already leased, and will be ready for occupancy about August 1, 1929.

5. Public Garage, adjacent to and connected with the Medical Arts Building and the Builders Exchange Building, is now under construction, having normal capacity of 1100 cars, and all of the space is leased to an operating company; will be ready for occupancy about May 1, 1929.

6. A department store is to be built in the near future adjoining the Tower Building and above the depot on the corner of Ontario Street, Prospect Avenue and the Public Square, which will have approximately 800,000 square feet of merchandising space. All of these buildings will be above and connected to the new union depot, and will be connected with each other by passage ways below the street level.

The following are average distances from the entrance to Wheeling's Passenger Station to some of the principal buildings in the City of Cleveland, as compared with the distances to those buildings from the nearest entrance to the new union depot:

Buildings	*Distance from Entrance to Wheeling's Station*	*Distance from Nearest Entrance to Union Depot*
11 Public Works Buildings	2780 feet	1868 feet
10 Hotels	2402 feet	2067 feet
5 Clubs	2740 feet	2740 feet
4 Arcades	1344 feet	1044 feet
2 Newspaper Offices	2612 feet	1912 feet
12 Banks	1904 feet	1454 feet
3 Churches	2508 feet	2000 feet
2 Markets	500 feet	1350 feet
13 Theatres	2592 feet	2538 feet
2 Educational Buildings	3000 feet	2338 feet
86 Business Buildings	2031 feet	1563 feet

That is a total of principal buildings considered of 150; average distance from Wheeling's Station, 2255 feet; average distance from union depot, 1741 feet.]

Describing now the proposed operation of Wheeling's trains and cars into the union depot of Terminals, using Exhibit No. 31 for explanatory purposes, in all probability until the section of track shown in green on this exhibit is

included in the portion which will be under cover our operation will be as follows:

Our steam locomotives which will bring our trains in will pull onto the track O-P and stop at a point just south of the point Q, where our steam locomotive will be cut off and backed into the siding and the electric locomotive of Terminals will attach and take the train into the union station. After unloading passengers, mail, express, etc. the train will be returned by Terminals' electric locomotive, which will probably cut off at a point just north of the connection at R. The train will then be taken by our steam locomotive to Wheeling's coach yard. On the outward trip the train will be taken from Wheeling's coach yard by our steam locomotive and delivered to the electric locomotive of Terminals at some point on the track O-P, from which it will be taken into the station, loaded with passengers, baggage, mail, express, etc. and returned by Terminals' electric locomotive, which will probably cut off at a point just north of R and back into the siding. The steam locomotive will then be attached and the train taken out onto our line. I might say that when that portion of Terminals' track is covered so that steam locomotives can not be conveniently used, the incoming trains will be pulled up to point O by the steam locomotive, where it will cut off and run forward on our own track. The electric locomotive will then attach and take the train into the station, unload the passengers, baggage, mail, express, etc. and return the train to point O, where it will be returned to Wheeling's coach yard by a steam locomotive. On the outward movement the train will be brought up from Wheeling's coach yard by a steam locomotive to the track O-P, taken into the station by electric locomotive, loaded and returned and delivered at about point O to the steam locomotive for handling over our line.

[The cost of operating trains to the new connecting track of the Terminals Company will be slightly less than the present cost of operating these trains to the Ontario Street station as the haul over our tracks is shortened by about 1535 feet. However, this saving is small and I have not attempted to calculate it. The rental of $20,000 per annum which will be paid to Terminals is about $4113.00 less per annum them the estimated cost of continuing to operate our present Ontario Street station which, as shown by Exhibit 8, is $24,113.58 per annum, and, as shown by Exhibit No. 10, is about $18,169.23 less per annum than the estimated cost of operating a new station should one be constructed by

Wheeling on the present site of its Ontario Street Passenger Station.

If Wheeling constructed a new station at an estimated cost of $170,000.00 in lieu of operating into the new union depot, it could not afford all of the accommodations and certainly none of the connections which would be afforded to passengers taken into the new terminal station. Wheeling's passengers and the traveling public, therefore, would be very much better accommodated in the new union depot than by anything Wheeling could give them at any reasonable cost. The $20,000 annual rental to be paid by Wheeling to Terminals under the user contract is a fair annual deduction for at least the first 25 years, but provision is made for an adjustment in the rental for the second 25 year period, because of any increased cost which may be justified on account of the direct service rendered to Wheeling. Furthermore, the contract provides that if Wheeling exceeds 3,000 trains per annum or 14,000 cars, Wheeling shall pay Terminals as additional rental the pro rata cost on the basis of $20,000, of such additional trains or cars.] Wheeling operates normally 2503 trains into and out of the Ontario Street station annually of an average of 3.3 cars per train, and, in my opinion, there is little likelihood that Wheeling's trains or cars will increase beyond the 3,000 trains or 14,000 cars per annum specified in the contract.

[The savings which Wheeling will secure in operation and maintenance charges by accepting Terminals' facilities and service do not include any yield on the net proceeds of the sale of Wheeling's lands north of Eagle Avenue. If such sale is effected, the proceeds thereof, under the terms of Article 10 of Wheeling's first consolidated mortgage or deed of trust, must be deposited with the Trustee who would customarily allow the company from 2½% to 3% interest thereon pending the withdrawal of such funds for expenditure for additions and betterments. Such expenditures should net Wheeling more than 5%, probably in excess of 6 or 7%, or more than the ordinary rate for money in the market. The net proceeds from the sale of Wheeling's lands north of Eagle Avenue would probably be in the neighborhood of a million and a half dollars, inasmuch as there would be some profit tax and some expense in connection with the release of mortgages, Trustee expense, abstract and various items chargeable against the gross sale price. So probably there will be net proceeds of about $1,500,000 invested within the next two or three years so as to return us something more than the ordinary rate of money.

The substitution by Wheeling of passenger station facilities and service in the new union depot of Terminals for its present passenger station facilities and service in its Ontario Street station will tend to retain Wheeling's passenger traffic, some of which might be lost if Wheeling's patrons were not afforded the facilities and service of the new union depot.]

Terminals proposes to construct its tracks across lands now owned and leased by Wheeling north of Eagle Avenue at approximately level 52 city datum. In lieu of the proposal to accept passenger station facilities and service in the new union depot of Terminals, I considered granting to Terminals an easement across Wheeling's lands north of Eagle Avenue, permitting Terminals to construct and operate its tracks at level 52 under Wheeling's tracks and station, but, since construction of the Eagle Avenue bridge, such a plan has become impracticable. I have here a plan and profile marked "Applicant's Exhibit No. 42, Witness Durham", which I desire to offer in evidence. Applicant's Exhibit No. 42 was received in evidence. Exhibit 42 shows the location of Wheeling's tracks in relation to the proposed tracks of Terminals north of Eagle Avenue, the latter being at level 52. Under the Eagle Avenue bridge Wheeling's tracks are at level 56.1 and cannot be raised because there is but a vertical clearance of 16½ feet under the Eagle Avenue bridge, being the minimum vertical clearance permitted by the Public Utilities Commission of Ohio at that point. At the Ontario Street station Wheeling's tracks are at level 65 and, to accommodate Terminals' proposed tracks below, Wheeling's tracks would have to be raised to level 73.5 from the south easement line to Huron Road. The distance from Eagle Avenue bridge to the point at which Wheeling's track begins to cross over Terminals' tracks is but 200 feet and, in order to secure the necessary minimum clearance of 17 feet over Terminals' tracks at that point, it would be necessary for Wheeling's tracks to rise at a 12.7% grade, prohibitive for railroad operation. This situation is, perhaps, better illustrated by a sketch, marked "Applicant's Exhibit No. 43, Witness Durham", which is intended to show the situation as it would exist if Terminals constructed its tracks at level 52 and Wheeling constructed its tracks and station above them. Applicant's Exhibit 43 was received in evidence.

CROSS EXAMINATION by Mr. Hoppe.

I do not know when negotiations first began for the acquisition by Terminals of Wheeling's Ontario Street

Passenger Station Site, because negotiations were handled direct by Mr. Duncan, President and Chairman of Wheeling's Board, with whom I have discussed the matter on numerous occasions since early 1924. I never discussed the matter on the basis of negotiations directly with any representative of Terminals and my discussion and study was always on the basis of inquiries made by Mr. Duncan and an exchange of ideas between him and myself as to what seemed best to be done and to the best advantage of Wheeling.

[Referring to picture No. 1 or 1894 of Exhibit No. 7, the platform or bridge upon which several men are standing abutting the north end of Wheeling Station is a diversion of Ontario Street, the plans for the construction of the union depot by Terminals under City ordinances requiring a widening of Ontario Street from Huron Road north toward Prospect Street, and I believe extending even south of Huron Road. The reason for the diversion of Ontario Street was to permit Terminals to make excavations therein just north of Wheeling's Ontario Street Station for the purpose of putting in a blind cross-over to be used at a later date for the possible connection of a subway that was to go out Huron Road. The platform at the north end of Wheeling's station was built by Terminals and the excavation from that platform north was done by Terminals. Referring to picture No. 4 of Exhibit No. 7, I do not know where the debris came from lying to the left of the picture behind the express trucks and things of that sort, nor whether it is a part of Terminals' excavation work. I have general charge of Wheeling's property, but do not remember in reference to this particular debris as to how it got there, or what it represents, but it does not represent the general condition of the grounds around Wheeling's Ontario Street passenger station. Picture No. 2 of Exhibit No. 5 is from the same negative as picture No. 1 of Exhibit No. 7. Picture No. 9 of Exhibit No. 5 shows the southwesterly end of Wheeling's station. Referring to the poles lying against the embankment upon which Wheeling's tracks are built and all the construction work going on to the right of the tracks, this was done by Terminals for the Cleveland Electric Illuminating Company as part of a tunnel underneath Wheeling's property at that point for the accommodation of the Illuminating Company to carry the latter's steam lines and electric wires into Ontario Street. This particular feature does not represent normal conditions.

The present plans of Terminals, as I understand them, require that Terminals' east approach tracks should be built at level 52, which will require the use of Wheeling's property. The Eagle Avenue bridge or ramp shown on Exhibit 43 was built by Terminals under a requirement of the City of Cleveland to furnish an outlet to the flats, and, as a result thereof, in the event Wheeling granted only an easement to use its property to Terminals at level 52, with the Wheeling using the property at level 65, Wheeling's tracks would have to have a grade of 12.7%, if we might assume such an absurd thing. Wheeling could not operate at such a grade.]

Under Wheeling's contract with Terminals for the use of the union depot, Wheeling maintains its own coach yard and does not need to use the coach yard of Terminals. Wheeling will use the coach yard it now has, the same being shown to the right of letters A and B in the upper right hand corner of Exhibit 1 attached to our application in Finance Docket 7298, where appear the words "coach yard". The right of way outlined in green on this Exhibit, between Central Avenue and Eagle Avenue, represents the tracks which Terminals will have to build to form a connection with Wheeling, and they will be located on property belonging to Terminals, it being Terminals' job to furnish the right of way.

The reason for Wheeling's taking up temporary passenger station facilities at the Erie station is that, if Wheeling sells its lands to Terminals, Wheeling must have quarters to use between the time it gives up its Ontario Street Station and Terminals is ready to take Wheeling into its new station, since Terminals would have to have the use of Wheeling's property to build its east approach. Wheeling has no agreement to sell its approach to Terminals, but has an option to require Building to purchase the same. I do not know that Terminals is ever going to acquire Wheeling's property to construct its easterly approach, but I imagine that Building will transfer to Terminals the right to cross Wheeling's property. [I do not know how that will be worked, but I think we are perfectly safe in it because we have a contract with The Cleveland Union Terminals Company that they will furnish us a station. If they can furnish the Erie station facilities until they do free of cost I think that is good contract.]

I was present at a directors' meeting of Wheeling held on July 11th, 1928, at which meeting the subject of author-

izing Wheeling's officers to enter into an agreement with Terminals to use the latter's facilities at a rental of $20,000 per year and to sell Wheeling's Ontario Street Passenger Station site to Terminals for $1,600,000 was discussed. I do not notice in the minutes of the meeting that any resolution in reference thereto was introduced. There was a lot of discussion had and I do not remember whether or not a resolution was offered or moved and seconded that the report which was made at the meeting by the Executive Committee be adopted and taken as the action of the Board and that the officers be authorized to do all things necessary to carry the same out; in reference to this I would have to be guided entirely by the minutes as I have no recollection. Such a resolution might have been offered and I not recall it. There was a protest made by both Messrs. F. E. and C. F. Taplin against any action being taken on the recommendation of the Executive Committee. I was present at a meeting of the Executive Committee of Wheeling held July 3rd, 1928. Intervener offered in evidence a certified copy of the minutes of the meeting of the Executive Committee of Wheeling held July 3rd, 1928, marked "Exhibit No. 44, Witness Durham", and the same was received.

Intervener offered in evidence a certified copy of the minutes of a meeting of Wheeling's directors held July 11, 1928, marked "Exhibit No. 45, Witness Durham", and the same was received.

Intervener offered in evidence a certified copy of the minutes of the Wheeling directors' meeting of July 20th, 1928, marked "Exhibit No. 46, Witness Durham", and the same was received.

Between July 11th, 1928, and July 20th, 1928, I did not have any dealings or negotiations with any representative of Building concerning the five-year option agreement to sell to Building for $1,600,000.

Intervener offered in evidence a certified copy of the minutes of a meeting of Wheeling's directors held November 23rd, 1928, marked "Exhibit No. 47, Witness Durham", and the same was received.

It is my impression that the Walworth or Wheeling's leased land is now owned by Building subject to Wheeling's lease.

(Adjournment)

January 22, 1929.

Since yesterday's testimony I have examined my files and find that I have a personal memorandum of the et-

ing of July 11th, 1928, and in that memorandum among other things is this:

"A resolution was offered by Warren Bicknell and seconded by Mr. Petrequin to the effect that the recommendation of the Executive Committee with respect to the sale of the Wheeling property lying northwest of Eagle Avenue and the use by the Wheeling of the new terminal passenger station be adopted and approved and ratified and taken as the action of the Board of Directors."

Yesterday Mr. Hoppe asked me regarding negotiations had with Terminals and I wish to make this statement in correction of the record: I have not at any time discussed with any one connected with Terminals on a negotiation basis the matter of granting to that company the right to use Wheeling's property north of Eagle Avenue in the City of Cleveland either under lease, sale or otherwise, nor have I discussed with them the terms upon which such right might, could, would or should be granted.

On the other hand, I have upon numerous occasions discussed with various representatives of Terminals numerous plans by which Terminals might, in the construction of its east approach, utilize the property of Wheeling lying north of Eagle Avenue in Cleveland. I also on several occasions discussed with representatives of Terminals the details of agreements designated to give effect to general terms already tentatively agreed upon by the principals.

The Medical Arts Building being constructed on the northwest corner of Prospect Avenue and Ontario Street, the Builders' Exchange Building being constructed on the northwest corner of Huron Road and Ontario Street, the Garage building being constructed immediately in the rear of these two buildings, the department store proposed to be constructed immediately east of the Terminal Tower Building and the proposed addition to the Cleveland Hotel, all are developments being made by Building and so far as I know Terminals has no interest therein.

The reason why Wheeling agrees to pay $20,000 a year for 3,000 trains and 14,000 cars when it has only 2,503 trains with an average of a little better than 8,000 cars is to allow leeway for additional trains and the amount of $20,000 for the number of trains and cars operated by Wheeling at the present time seems to be, according to my information from Mr. Duncan, about the best terms Wheeling could get from Terminals. After discussing the matter with Mr. Duncan and after some further negotiations with

Terminals an agreement was finally reached for the increase to 3,000 trains and 14,000 cars so that Wheeling might take care of excursion business and some additional cars which might possibly come in from, say Pittsburgh and Connellsville, if Wheeling's lines should ever be extended to that extent.

Repeating, the $20,000 seemed to be the low figure that Wheeling could get with any number of trains consistent with what Wheeling is now operating into the station and was at that time operating into the station. The so-called user contract provides for an increase in rental for every increase in trains or cars beyond 3,000 trains and beyond 14,000 cars. It did not seem to be possible to make a contract on the basis of 2,500 trains with an average of 3.3 cars to the train, or 8,000 cars and a proportionate increase thereafter just as we did with 3,000 trains and 14,000 cars. The exhibits showing the cost of maintenance and operation of Wheeling's Ontario Street Station were prepared to show and do show the cost of operating the station as it now stands and the probable cost of operating a new station which would embrace the minimum requirements of the Wheeling assuming it continued to operate passenger trains. Even a smaller number of trains would require a building and certain attendants to take care of the trains, even if reduced by two trains a day. I doubt if the expense could be reduced, certainly not proportionately.

Q. (By Mr. Hoppe) Mr. Durham, did you make the same calculation that you made with respect to the operation of your Ontario Street passenger station at the present time and the check that you made of operating a new Ontario Street passenger station if you were able to build one: did you make the same check as to the $20,000 rental basis that the Cleveland Union Terminals Company, you say, demanded for taking your trains into the Cleveland Union depot?

A. I compared the $20,000 with what it is costing us now and what it would probably continue to cost us if w stayed at the location we now are and had to do the thing that we, obviously, would have to do, namely: to put up a fireproof building,—compared those costs with the $20,000, and based on the results of that comparison I felt that we were justified in accepting the proposal of the Terminals Company to take us in at $20,000.

I had no way of checking what it would cost them to do the work for us. I believe that if we pay a proportionate share, the same as is paid by the proprietary lines, or will

be paid by them, that we could not afford to go near the station—I mean the new Union Terminals station.

Wheeling operates probably 25 excursion trains annually having 5 to 8 cars per train, and these were not included in my calculation of 2,503 trains per annum with an average of 3.3 cars per train.

My discussion with the representatives of Terminals relative to the utilization of the Wheeling property and the details of the agreements which had been proposed by the principals were had on numerous occasions with Mr. Jouett, the chief engineer, and on several occasions, in company with counsel, with Mr. Stage, secretary and general counsel of Terminals, and once or twice with Mr. Bradley, president of Terminals. Mr. Jouett is the chief engineer in charge of all of Terminals' construction work and it was with him that I discussed these matters usually, or sometimes with one of his assistants, Mr. Badger. In any of these discussions I cannot recall anything being said bearing on what percentage of the cost of the operation of Terminals Wheeling should pay. There was discussion as to what the actual out-of-pocket cost to Terminals would be and as to whether or not the $20,000 agreed to be paid would meet the same. I did not enter into the details of that discussion to the extent of being able to give you any of the figures used and if anyone has reached a conclusion on that I am not advised of it.

Our discussion concerning the out-of-pocket cost to Terminals was more or less informal in nature and I am not clear as to how the matter came up, but the question did come up as to whether or not Terminals was getting from Wheeling sufficient money to pay the out-of-pocket cost. There was some discussion and talk about how to arrive at the out-of-pocket costs to determine whether or not Terminals would be reimbursed by the $20,000 for the cost of handling Wheeling's trains but I am unable to give you the conclusion because it was a matter more or less academic to us. If Terminals was not getting all it should, that was something that so far as I was concerned was just too bad. That discussion was had with Mr. Stage and I think there was present a Mr. Griffith, an accountant, whether employed by Terminals I am not sure.

A report prepared by Witness Durham was marked "Exhibit No. 48, Witness Durham," identified, offered and received in evidence.

The report, Exhibit No. 48, was submitted by me to the Executive Committee at the meeting on July 3, 1928. It was prepared in conjunction with other officers of the rail-

road. No contract had yet been made, as proposed in Exhibit No. 48, for an adjustment of the vacated areas, that is to say, in reference to the exchange of territory which reverts to the Wheeling due to the vacation of certain streets in connection with the construction of the new union depot. My understanding is that there is an understanding between Mr. Duncan and Terminals in reference thereto. As a matter of fact, it is possible that all of these streets are not as yet vacated. This report (Exhibit No. 48) on page 10 contains a recommendation that a sale be made of the property rather than a lease. I have testified as to the necessity for Terminals under the present plans to go over the Wheeling property at level 52, which is considerably beneath the level of Ontario Street. The question of granting to Terminals an easement at level 52 reserving to Wheeling the air rights above it was considered. I did not consider it advisable because I believed if Wheeling could get $1,600,000 for the sale of its property that it would be better for Wheeling to accept it than to attempt to develop the air rights. I reached this conclusion some time in June 1928, at which time I had before me information as to the value that had been placed upon the air rights of Building over that part of the station which is in what is considered as the Terminal area proper, that is, where the Terminal Tower Building is constructed. I do not remember whether the value placed on those air rights at that time was $82.00 a square foot. The Medical Arts Building and the Builders Exchange Building, to which I have referred as being constructed on Ontario Street between Prospect Street and Huron Road, are not very far from the Wheeling property. The width of the new Huron Road is 100 feet and Wheeling's property is a little more than 100 feet from the Builders Exchange Building, the latter being back a little from Huron Road. My understanding is that the Builders Exchange Building and the Medical Arts Building are being built over the terminal depot on the air rights which Building has over the depot. This report (Exhibit No. 48) was submitted to the directors at their meeting on July 11th 1928.

RE-DIRECT EXAMINATION by Mr. Martin.

Yesterday I was asked what assurance Wheeling had that Terminals would receive its easement in the land which Wheeling proposes to sell to Building, and I stated that Wheeling has no contract requiring that transfer. I have since secured from Terminals through Mr. Stage a copy

of contract entitled "Cleveland Union Terminals Company with the Cleveland Terminals Building Company—Land Contract—dated January 1, 1922," and a letter dated February 16th, 1927, supplementing that contract, addressed to the Cleveland Union Terminals Company, signed by the Cleveland Terminals Building Company by M. J. Van Sweringen, president, and approved by the Cleveland Union Terminals Company by O. P. Van Sweringen, president.

The land contract referred to was marked "Exhibit No. 49, Witness Durham," identified, offered and received in evidence. The letter referred to was marked "Exhibit No. 50, Witness Durham," identified, offered and received in evidence.

Section 2, page 3 of the contract, Exhibit No. 49, provides that parcels of land required for the passenger terminal included within the easterly approach, the land of Wheeling being in this easterly approach area, shall be acquired with reasonable dispatch by Building and conveyed or caused to be acquired and conveyed to Terminals at the consideration of $1.00. Section 3 at the top of page 12 provides in effect that the consideration to be paid by Terminals for the conveyance of the perpetual easement required for the passenger terminal over the parcels included within the easterly approach shall be the sum of $1.00 as provided in Section 2, Article 1. Counsel advises that Terminals can require specific performance of these provisions and that if Building should acquire the land of Wheeling, Terminals would be in a position to require Building to transfer the easement under the terms of this contract.

The map attached to Exhibit No. 49 shows that the easement so to be conveyed to Terminals lies across the property of Wheeling north of Eagle Avenue. I have been advised by Mr. Stage, secretary and general counsel of Terminals, that these two exhibits Nos. 49 and 50 constitute the agreement or agreements between Building and Terminals for the conveyance of this easement from Building to Terminals.

I do not know definitely that any of the streets upon which Wheeling's lands north of Eagle Avenue abut have been vacated. In reference to the air rights over Wheeling's property, particularly in comparison with the value of the air rights over the Terminal area proper, I studied the matter to the extent of having estimates as to the probable cost of buildings that Wheeling might erect over such

air rights and the probable cost of operating such buildings and the probable return and my conclusion was that it would not be profitable for Wheeling to attempt to do that insofar as immediate development is concerned, and I concluded that the same would in any event be less profitable to Wheeling than the proposed sale at $1,600,000. I do not know that Terminals demanded $20,000 per annum from Wheeling as compensation for passenger station facilities and service in the new union depot as that fell within the realm of negotiations which were carried on by the principals. [I discussed with Mr. Duncan and considered the question of granting Terminals sub-surface rights over Wheeling's property and reserving the air rights and made calculations upon the basis of the cost of the building and the maintenance of it and the return thereon as compared with the $1,600,000 which Wheeling was offered for the property and, as to an immediate development, I considered the possibility of disposing of these air rights at some time in the near future after Wheeling had built thereon. I made some investigation as to what had happened to air rights in New York, Philadelphia and Chicago where they have been rather extensively used of recent years, that is, I made some inquiries to find as nearly as I could how it had developed and made some comparison as to the locations, for instance, New York, to consider whether Wheeling's property had any prospect of development that would be comparable to New York. I cannot recall all the details because I did not keep an absolute log on that but that was taken into consideration. Taking all these things into consideration, I came to the conclusion that it would be more profitable to Wheeling to dispose of all the property at $1,600,000 than merely to sell the sub-surface rights reserving the air rights.]

A certified copy of the Articles of Incorporation of The Wheeling & Lake Erie Railway Company was marked "Exhibit No. 51, Witness Durham," identified, offered and received in evidence. A certified copy of the code of regulations of The Wheeling & Lake Erie Railway Company was marked "Exhibit No. 52, Witness Durham," identified, offered and received in evidence.

It was stipulated that applicant's returns to questionnaires in Finance Dockets 7298 and 7299 should be made a part of the record.

[Ralph E. Bartlett, called as a witness for the applicant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Martin.

I reside at 340 Morewood Parkway, Rocky River, Ohio, a suburb of Cleveland, and my occupation is superintendent of schedules for The Cleveland Railway Company, which position I have held for seven years. As such, it is my duty to supervise the making of time tables as ordered by the City Council of Cleveland through the Street Railroad Commissioner's office; also making such other data and records as are necessary to our office. This work has familiarized me with the loading points of the various street car lines in the downtown section of Cleveland. The Cleveland Railway Company operates surface lines and local busses in the City of Cleveland and its suburbs.

A map showing the location of the surface street car lines and motor coach lines of The Cleveland Railway Company in the City of Cleveland was marked "Applicant's Exhibit No. 53, Witness Bartlett," identified, offered and received in evidence.

With the exception of the north and south lines known as crosstown lines, the general plan of operation of the street car lines and motor bus lines shown on Exhibit No. 53 is that they all touch the Public Square or adjacent to it in the heart of the city, coming in from the outlying districts and looping through the Public Square or some point near thereto. The names shown in black letters (Exhibit No. 53) alongside the various red lines are the names of the street car lines, which generally correspond to the names of the streets upon which those lines run.

A map prepared by witness showing the lines of The Cleveland Railway Company in the downtown district of Cleveland was marked "Applicant's Exhibit No. 54, Witness Bartlett," identified, offered and received in evidence.

I am familiar with the location of Wheeling's Ontario Street passenger station and the proposed location of the Cleveland Union Terminals Company's new union depot in the City of Cleveland; also with the various loading points on the surface lines and busses serving downtown Cleveland in the general vicinity of the Ontario Street station and the proposed new union depot. Taking up Exhibit No. 54, the principal loading points are shown first by naming the car line and the number imposed upon that in black ink. For illustration, black ink No. 1 shown in the southeast quarter of the Public Square means that that is the principal loading point for the Euclid car lines, Euclid Heights car line, and the Cedar car lines. Those black ink numbers are the same as the black ink numbers shown in

circles on the exhibit heretofore introduced as Exhibit No. 12. The numbers appearing after the words "Euclid," "Euclid Heights," "Cedar" at loading point No. 1 are the number of units that we operate into the Public Square on each one of those lines in a 24-hour period, a unit in this particular case meaning a motor car, the trailers being omitted because they vary. The same method has been used in illustrating the principal loading points, the lines and the number of units passing there in 24 hours, for each of the other points shown on the exhibit. I have measured or caused to be measured the distances from the entrance to Wheeling's Ontario Street passenger station and from the nearest entrance to the new union depot to the nearest loading point on such street car or bus lines with the following results:

Loading Point No.	Distance in feet from Nearest entrance New Union Depot	Ontario Street Station
1	450	1450
2	175	1400
3	450	1750
4	885	1850
5	1135	2175
6	350	1300
7	150	950
8	225	850
9	450	750
10	800	1825
11	375	1375
12	500	1725
13	925	25
14	900	150
15	825	300

These points, 1, 2, etc., are the loading points shown on Exhibit No. 54, and the distances read are the shortest distances from the Ontario Street station on the one hand, and from the new union depot on the other hand, to the particular lines shown opposite these loading points. With the exception of loading points 13, 14 and 15, the distance is shorter in every case from the new union depot exit than from the Ontario Street station exit. Point 13 carries the Fairfield and Woodland Avenue lines; point 14 carries the Broadway, Union, Central and West 14-Clark lines; and point 15 the Kinsman line. Measuring the importance of the

various lines from the standpoint of passengers carried (using November, 1928) they rank as follows, in round figures:

No. 1, Euclid Avenue, 2,500,000; No. 2, St. Clair Avenue, 2,400,000; Nos. 3 and 4, crosstown lines; No. 5, Superior Avenue, 1,500,000; No. 6, West 25th Street, 1,500,000; No. 7, motor coach line, no figures; No. 8, Lorain Avenue line, 1,300,000; No. 9, Kinsman Road, 1,100,000; No. 10, Woodland Avenue, 1,100,000; No. 11, Euclid Heights, 1,100,000; No. 12, Detroit Avenue, 1,000,000; No. 13, Broadway, 900,000; No. 14, West 14th Street, 900,000; No. 15, Bridge Avenue (shown on maps, Exhibits Nos. 53 and 54, as Madison Avenue), 900,000; No. 16, Cedar Avenue, 800,000; No. 17, Union Avenue, 800,000; No. 18, Scovill Avenue, 700,000; No. 19, Payne Avenue, 600,000; No. 20, crosstown line; No. 21, Wade Park, 600,000; No. 22, crosstown line; No. 23, Fulton Road, 400,000; No. 24, Clifton Boulevard, 400,000; No. 25, Central Avenue, 300,000; No. 26, Fairfield Avenue, 100,000; No. 27, East 30th Street, crosstown line; No. 28, Union Depot line, 100,000; No. 29, Scranton Avenue, not shown; No. 30, Clark Bridge, crosstown line; No. 31 Pearl Road, a dinky line in the suburbs, not shown; No. 32, Abbey Avenue, a short crosstown dinky, not shown; No. 33, West 35th Street, dinky in the outlying districts, not shown; No. 34, Broadview, dinky in the suburbs, not shown; No. 35, East 9th Street Pier line, 8,000.

The distances from the nearest entrance to the new union depot to the nearest loading point on all of the lines which touch at or near the Square are shorter than from the entrance to Wheeling's Ontario Street station with the exception of the Fairfield line at point 13, ranking 26th in order of importance, the Woodland line at point 13, ranking 10th in order of importance, the Broadway line at point 14, ranking 13th in order of importance, the Union line at point 14, ranking 17th in order of importance, the Central line at point 14, ranking 25th in order of importance, the West 14th-Clark line at point 14, ranking 14th in order of importance and the Kinsman line at point 15, ranking 9th in order of importance.

Referring to Exhibit No. 54, passengers leaving the Erie Depot at Superior Avenue would board east and west bound cars on a lower level of the so-called Superior Avenue High Level bridge at points 16 and 17, such cars being the Lorain, South Brooklyn, Madison, Detroit, Clifton and Fulton car lines; and on the upper level of the bridge will board the Carnegie-Clifton coach line. Anyone wishing to

go west on any of the lines mentioned would take his car or bus at either point 16 or 17 on the high level bridge and going eastward into the Square would take his car at point 17. The distance from the Superior Avenue station of the Erie to points 16 and 17 is not over 300 or 400 feet, up a ramp or covered passage-way which is shown in Exhibit No. 32 and right on to the high level bridge. The approximate loading points can be seen practically behind the Erie station on pictures 20 and 21 of Exhibit No. 32. All the distances given are the distances which a person would have to walk in going between these station exits and loading points.

Cross Examination by Mr. Hoppe.

I have no idea how far points 16 and 17 are elevated above the Erie tracks. I don't know whether a passenger coming from the Erie station goes up a flight of stairs to the street to the east of the station. I can't tell how many stairs he has to climb nor what distance he has to walk when he gets to the top of the stairs to get to points 16 and 17, the latter point being on the lower level of the high level bridge, which in turn goes over the tracks of the Erie. At point 1 we have 354 Euclid cars or units per day, these making a complete circuit of the Euclid Avenue route per day. The loading points indicated in the circles are the main loading points for the various car lines indicated after the circles. I do not know the distance from the main entrance of the proposed new union depot to its waiting room or train-shed, nor the distance from the Wheeling's Ontario Street station entrance of the waiting room and train shed of the new union depot. The route of the Broadway cars which load at point 8 comes from the south on Ontario Street to Prospect, east on Prospect to East 2nd, through East 2nd to Huron Road, east on Huron Road to East 4th, through East 4th Street to Broadway and then out south on Broadway. The car comes in on Broadway and passes the Wheeling station on Ontario Street, thence down to Prospect Street, thence north on Prospect to Second, thence over to Huron, thence east on Huron to 4th Street, and thence in a general southerly direction out Broadway and then south. I have no information as to how far, on the return trip of the Broadway cars, it is from the intersection of Second Street and Huron Road to the entrance of Wheeling's Ontario Street passenger station but would say it is approximately 300 feet. The Union car, whose main loading point is point 8, comes into Cleveland and goes

out the same as the Broadway car. The Central car comes in from the east on Central Avenue to Ontario Street, thence north on Ontario Street to Prospect and east on Prospect to East 9th Street, thence south on East 9th Street to Central, so it likewise goes by Wheeling's Ontario Street passenger station. The Clark Avenue car comes across the 14th Street Central Viaduct to Ontario Street, thence north on Ontario Street to Prospect, east on Prospect to East 9th, south on East 9th Street to Central, west on Central to the Central Viaduct, thence on 14th Street and likewise passes Wheeling's Ontario Street passenger station. There is a passenger station stop opposite this station at which the Broadway, Union, Central and Clark cars stop. The Fairfield car comes in across the 14th Street Viaduct to Central Avenue, east on Central to East 9th Street, north on East 9th Street to Prospect, west on Prospect Street to Ontario Street, thence south on Ontario Street to Central Viaduct to West 14th Street, and on its outgoing trip likewise passes Wheeling's Ontario Street passenger station. The route of the Woodland Avenue car is Woodland Avenue, north on East 9th Street to Prospect, west on Prospect to Ontario Street, south on Ontario Street to Woodland, and likewise passes Wheeling's Ontario Street passenger station. The route of the Wade Park car is from East 22nd Street, which is not shown, west on Prospect Street to Ontario Street, north on Ontario Street to Euclid, east on Euclid to 14th Street, so its first loading point on its outgoing trip is at the corner of Prospect and Ontario Street. The Kinsman car's route is on Woodland Avenue through East 4th Street, north to Prospect, west on Prospect to East 2nd, south on East 2nd to Huron Road, east on Huron Road to East 4th Street, and south on East 4th Street to Woodland, and the Kinsman car, at the intersection of 2nd Street and Huron Road, would be about 300 feet from the entrance of Wheeling's Ontario Street passenger station. There are no car lines other than those shown on the map which come in over Ontario Street or Huron Road or that go out over those roads.

RE-DIRECT EXAMINATION by Mr. Martin.

The Fairfield, Woodland and Broadway lines do not pass Wheeling's Ontario Street station in both directions only on the outward bound trips. The Union, Central and West 14th-Clark lines pass this station on the inbound trip only. The Kinsman line does not pass this station at all. Our rules permit the loading of outbound passengers at a

stop where the car is still on its inbound trip in one or two cases, but in connection with the Fairfield, Woodland, Broadway, Union, Central, West 14th-Clark or Kinsman lines they do not. Passengers pay fares both entering and leaving cars depending upon the direction the car is going. With the exception of Euclid Avenue the system is pay-enter coming down and pay-leave going out, but this rule is flexible and not always adhered to.]

HENRY D. JOUETT, called as a witness for the applicant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Martin.

I reside at 13617 Drexmore Road, Cleveland, and I am Chief Engineer of Terminals in charge of the design and construction of the new union depot. I am a civil engineer by profession, having graduated from the Massachusetts Institute of Technology in 1900, was in the employ of the New York Central Railroad until January, 1922, mostly in the New York district on freight and passenger terminal matters. In the spring of 1920 I was detailed to study the Cleveland Union Passenger Terminal for the New York Central and following the approval of the terminal project by the Interstate Commerce Commission in the latter part of 1921 I was appointed Chief Engineer of Terminals, effective January 1, 1922, and have served in that capacity since. We immediately organized an engineering force, started preparation of detailed working plans and commenced work in the spring of 1922, construction being under a certificate of convenience and necessity issued on or about December 6, 1921, by the Interstate Commerce Commission in Finance Docket 1237, known as the Cleveland Passenger Terminals case.

A copy of the report and order of the Interstate Commerce Commission on rehearing in Finance Docket 1237 was marked "Applicant's Exhibit No. 55, Witness Jouett," identified, offered and received in evidence.

The union terminal consists of a passenger station and yard about 35 acres in extent, and about 2500 feet in length, with approaches to the east and to the west from the station yard approximating a mile and a half each way. [Work on the westerly approaches to the station is very well advanced, the excavations, walls and bridges being about 95 per cent. completed. The viaduct across the Cuyahoga Valley, 3500 feet in length and clearing the river at 93 feet,

is about 80 per cent. completed. The foundations of that viaduct and piers are entirely completed and the erection of the steel work is nearly completed. I have here a progress photograph of the Cleveland Union Terminal, No. 4241, dated January 7, 1929, showing the extent of the construction of the viaduct just mentioned, marked Applicant's Exhibit No. 56—Witness Jouett, which shows a line of concrete piers extending across the Valley from the westerly end of the station area, which is at the right hand side of the photograph, crossing the river with a truss bridge and extending to the open cut excavation which is shown in the upper left hand part of the photograph. It shows the steel deck on these piers as being erected from the southerly or westerly side of the viaduct at the left hand side of the sheet, towards the northerly end of the viaduct at the right hand side of the sheet. The long bridge in the right hand side of the picture is the Detroit-Superior high level viaduct in the City of Cleveland, the same double-deck structure to which Mr. Bartlett referred a short time ago. Just under the curved road leading down from the right hand side of the photograph is the Superior Avenue station of the Erie, the vertical line at that point being the chimney on that station. Applicant's Exhibit No. 56 was received in evidence.

On the easterly approach the excavation, retaining walls and bridges are about 80 per cent. completed with the exception of the spread between Eagle Avenue and Huron Road where our work is at a standstill on account of getting across the property of Wheeling. At this point I might say that our construction program contemplates the completion of the terminal approximately by January 1, 1930. If we get the right to cross the Wheeling property in the near future we think we can still make that date by concentrating at that point through night and day work. I have here a photograph No. 4185-A, dated December 18, 1928, being a progress photograph of the Cleveland Union Terminal, marked Applicant's Exhibit No. 57—Witness Jouett. Immediately to the right of Wheeling's Ontario Street station building shown at the left hand side of the photograph will be noted a concrete retaining wall constructed in connection with the building of an electric tunnel under the Wheeling tracks for the Cleveland Electric Illuminating Company. To the right of that wall is shown the condition of the excavation being performed by Terminals on December 18, 1928. There is also indicated in that area a steam shovel, to the right of which is another retain-

ing wall constructed in connection with the building of the steam tunnel for the same company under Wheeling's tracks. Following that construction to the left is shown a retaining wall at the left hand portion of the photograph constructed by Terminals along the easterly side of Canal Road, behind which is shown a concrete box, which is the steam tunnel for the Illuminating Company. The terminal tracks, as contemplated by Terminals' plan, pass just across the top of that box and indicate the extent to which the present ground must be cut down in order to meet the plans of Terminals. Terminals' tracks cross at the location of the existing tracks shown in this photograph, the photograph being taken from a point northerly of Eagle Avenue, possibly off the Eagle Avenue bridge looking northerly toward the Wheeling station, and showing most, but probably not all, of Wheeling's right of way between Eagle Avenue and the center of its Ontario Street passenger station. The building shown in the lower left hand corner of the photograph is a part of the Illuminating Company's Canal Road plant, which furnishes electricity for Cleveland's downtown section, and the road shown in the lower left hand corner is Canal Road. Terminals has let a contract for excavating in the area north of the Wheeling and to the right of the right hand retaining wall shown in the photograph, which work will start in that area at once. In other words, we are working at every point we can work, pending the settlement of this proceeding. The foundations or parts thereof running along the center of the photograph are the basement walls of the former buildings which have been wrecked to permit the carrying on of the terminals construction, which buildings I believe were not buildings formerly served by Wheeling but there were buildings to the left of those, as indicated by the photograph, which were served by Wheeling's side tracks, all of which have been razed. Applicant's Exhibit No. 57 was received in evidence. A progress photograph, No. 4171, dated December 19, 1928, was marked "Exhibit No. 58—Witness Jouett," identified, offered and received in evidence.

Exhibit 58 shows the construction work of Terminals being carried on under Ontario Street in the carrying of tracks diagonally thereunder from the Terminals property on the west side of the street north of High Avenue to the property on the west side of Ontario Street southerly of Huron Road. Wheeling's station in the background shows the relationship of that building to the work in progress and indicates how Terminals' tracks will pass directly

across the location of that building about 40 feet below street level. The temporary trestle on the right has been constructed to detour the traffic of Ontario Street around the construction work. The stacks in the background at the right hand corner of the photograph are those of the Canal Road plant of the Cleveland Electric Illuminating Company, and Ontario Street is seen running off to the rear in the center of the photograph. Ontario Street will be restored to its original condition when this construction work thereon is completed. The top of Terminals' construction will be approximately 20 feet below the street level as restored, leaving a space between the top of Terminals' construction and the street level for a future city subway, that being one of the requirements of the City of Cleveland. The trestle detour will be entirely removed upon restoration of the street. Exhibit No. 58 in conjunction with Exhibit No. 57 shows how Terminals is working around both sides of the Wheeling station, and Exhibit No. 58 shows a steam crane used for excavation and handling timbers and the other structural materials. A portion of Ontario Street shown in the background near the Wheeling station will not be treated in the same manner as the portion in the foreground as there will be more tearing up of Ontario Street to be done just to the east of the Wheeling station, that is, to the left as shown in the photograph. The tracks bear off somewhat to the right of the Wheeling station in the background where they pass off of Ontario Street.

A progress photograph, No. 4188, dated December 20, 1928, was marked "Exhibit No. 59—Witness Jouett," identified, offered and received in evidence.

Exhibit 59 taken from Superior Avenue looking easterly across the station site towards Ontario Street shows the progress of the station building construction as of December 20, 1928, the left upper corner showing the two wings of the Tower Building located directly over the main station entrance and ramps of the station. The open spaces in the structure below the street level to the right of the structure are portions of the station building, the lowest opening being that of the track level. The street construction in the last half of the picture is that of Prospect Avenue extended, which is nearly completed and is carried across over the Terminals station building from Ontario Street to Superior Avenue. The easterly half of Prospect Avenue extended has been paved and the westerly half is now receiving the final steps in the construction procedure.

To the right of Prospect Avenue in the immediate foreground is shown the structural steel work for one of the cross streets which will connect Prospect Avenue and another street being constructed over the Terminal from Superior Avenue to Ontario Street called Huron Road Extension. The foundations for Huron Road extension are 90 per cent installed and the derrick and steel work in the right foreground is now being erected for Huron Road. Leading from the steel work of the cross street which is called West 6th Street is the steel work for the baggage and cab ramp to the baggage room and cab stand. Those ramps lead down from the street level to the station floor level, a drop of about 15 feet at that point. The opening just to the right of Prospect Avenue beyond the steel of the ramp is the entrance of the cab stand, which lies under Prospect Avenue and some of the construction to the right of Prospect Avenue.

The uncovered concrete work in the foreground east of the baggage and cab ramps is the baggage driveway, behind which is the roof of the station building construction extending from the baggage driveway through to and under the steel work which can be seen in the background. Within those limits are located the baggage room, waiting room, steam concourse, dining facilities, mail and express facilities, and some other miscellaneous facilities of the station. The construction shown in about the middle of the picture and projecting above the general level of the construction is that of the skylights over the steam concourse. To the right thereof is shown the graded area of the track level over a part of which will be constructed Huron Road and under Huron Road will be other station facilities. In the background at approximately the center of the picture can be seen the Wheeling station and the temporary Ontario Street detour and trestle. To the right of the Wheeling station can be seen the stacks of the Illuminating plant. The steel work in the center background is that of the Medical Arts, garage and Builders' Exchange buildings being constructed over the station tracks and buildings.

The excavation of the station area is about 95 per cent completed. It varies from 25 feet to 40 feet in depth. The foundations for the station buildings are also about 95 per cent completed; the steel work for the station buildings is all under fabrication or fabricated and about 80 per cent has been placed. The concrete work and the finish of the station building are between 40 and 50 per cent completed. Construction throughout the whole terminal has reached

the point for placing tracks in the month of February. All the station building work is under contract and nearly all of the terminal work is under contract. There may be a few things yet to be contracted for but the bulk is already contracted for. By terminal I include everything within the three and a half to four miles heretofore mentioned, that is, the station and the east and west approaches.

A progress photograph No. 4176, dated December 19, 1928, showing the extent of the Terminal construction as viewed from Ontario Street looking westerly towards Superior Avenue, was marked "Exhibit No. 60—Witness Jouett", identified, offered and received in evidence.

In the upper right portion of Exhibit 60 is seen again the easterly wing of the Tower Building, the lower opening under the building being the track level and the opening in between the track level and the street level being that of the station floor. The foreground shows the paving work proceeding on the Prospect Avenue viaduct. The left hand side shows the steel work of the Medical Arts Building and the left background shows the sky light over the steam concourse of the station. Between the Medical Arts Building and the sky light work of the concourse can be seen another one of the cross streets called West 2nd Street.

A progress photograph dated December 24, 1928, Nos. 59-60-61, marked "Exhibit No. 61—Witness Jouett," was identified, offered and received in evidence. Exhibit No. 61 is a panoramic view of the station work looking from Canal Road to the south of the station towards the station work and the Tower Building. On the extreme left is shown the Rockefeller building which is on the northerly side of Superior Avenue, West 6th Street being to the right of the Rockefeller building and directly back of the derrick. The derrick has just started on the erection of the steel work for Huron Road. To the left of the derrick is shown the steel work of West 6th Street between Huron Road and Prospect Avenue. To the right of the derrick is shown the ramp leading to the baggage room and cab drive. At the foot of that ramp in the uncovered area is the baggage driveway and to the right of that driveway behind the partition wall is the baggage room, and back of that is the cab stand under Prospect Avenue.

At the extreme right of the photograph is shown again the steel work of the Medical Arts and garage building superimposed on the station construction, and to the left of the Medical building and just back of the steam rising from the locomotive is the sky light construction over the steam concourse.

In general the station building work is below the street level, but the ceiling of the steam concourse is about 20 feet above the general street level.

This photograph shows the relationship of the track level on which temporary construction tracks have been laid, the station floor level next above it, and the street level next above that, except in a few places, as just to the left of the steam rising from the locomotive will be seen an intermediate floor which is used for mechanical facilities of the station and for passageways in general. On either side of the right hand side of the photograph are the two wings of the Tower with the main shaft of the Tower in the background, and to the left of the Tower building is shown the existing Hotel Cleveland, to which additions have been planned to the left and to the right. The entrance from Prospect Avenue to the new union depot is shown by the two wings at about the place where the right hand split comes in the photograph and comes down between the westerly opening to that entrance and the middle opening to that entrance, there being three openings into a vestibule at Prospect Avenue. The photograph shows them at present boarded up. This is the 100 foot elevation.]

CROSS EXAMINATION by Mr. Hoppe.

The cost of the Terminal development to date is somewhere above fifty million dollars, this being for work done and paid for. I have not made any recent estimate of the additional cost to complete the work. There is not much work done which is unpaid for, probably not over half a million dollars. I have done no figuring for two years on the additional cost to complete the station and there is no one connected with Terminals capable of giving those figures. There might be, I do not know, so I will not say for sure that they have them. The original estimated cost of the station before the work was started was sixty million dollars. I think upwards of fifty million dollars have been spent. I question whether it is going to be completed within that estimate. The cost may run 10 or 15 per cent over that.

RE-DIRECT EXAMINATION by Mr. Martin.

There has been no vacation, to my knowledge, of any part of Canal Road or Huron Road or Canal Road Extension, sometimes known as Vinegar Hill, abutting upon the property of the Wheeling north of Eagle Avenue, and I keep advised as to matters of street vacation in that territory, because the plats on which those vacations are based

are made in my office, or all other vacations have been made in my office, and I presume the same procedure will follow in the case of the streets you have mentioned. I have seen the agreements entered into on February 2, 1928 and February 21, 1928 between Terminals and Wheeling providing for certain construction work on behalf of Terminals on Wheeling's lands. The paper handed me (Exhibit 62) is an original agreement between Terminals and Wheeling dated February 2, 1928, providing for the temporary relocation of Ontario Street between the southerly line of High Street extended and the southerly line of Huron Road extended and the temporary use of a portion of Wheeling's property for that purpose, and in addition thereto for the temporary closing to public travel during the period of construction of Vinegar Hill (which is the railway company's only direct way of ingress and egress to the track level of its Ontario Street station) and the construction and maintenance of a temporary roadway in lieu thereof. Terminals did no work on Wheeling's property prior to the execution of the agreement of February 2, 1928 and the work done since has been done pursuant to its terms. The entire cost and expense of all this work is required to be assumed and borne by Terminals under the provisions of section 3 of the agreement and, under the provisions of section 4, Terminals agrees to fully indemnify Wheeling. The agreement provides in section 1, paragraph E for the removal of Ontario Street as relocated and the restoration of Wheeling's property and sidewalk adjoining it after the relocated street has served its purpose. It also provides for the ultimate restoration of Vinegar Hill to its former condition, all of these matters at the expense and cost of Terminals.

The contract between Terminals and Wheeling referred to by witness, dated February 2, 1928, was marked "Exhibit No. 62, Witness Jouett," identified, offered and received in evidence. The contract supplementary thereto dated February 21, 1928 was marked "Exhibit No. 63, Witness Jouett", identified, offered and received in evidence.

I have seen Exhibit No. 63 which provides for a modification of the relocation of Ontario Street and/or Vinegar Hill and the construction upon the property of Wheeling of a portion of the sub-tunnel. It was necessary to enter into this supplemental agreement following the execution of the agreement marked Exhibit No. 62 because between the dates of the two agreements a change was made in Terminals' track plans which necessitated a modification of Exhibit No. 62 and which was effected by this supple-

mental agreement Exhibit No. 63. None of the work provided for in Exhibit No. 63 was commenced by Terminals on Wheeling's property prior to the execution thereof. [Section 2 of Exhibit 63 provides that the exercise of the right or privilege given by the agreement shall give Terminals no interest whatsoever in the land occupied by the sub-tunnel; Section 4 provides for a complete indemnity of Wheeling for any loss, cost, damage and expense on account of the construction work; the agreement also provides that in the event the construction work damages Wheeling's Ontario Street passenger station that will be made good in a variety of ways at the option of Wheeling.]

A letter, consisting of 14 pages, from the Wheeling and Lake Erie Railway Company to Mr. C. L. Bradley, President of the Cleveland Union Terminals Company, dated June 15, 1928, was marked "Applicant's Exhibit No. 64, Witness Jouett," identified, offered and received in evidence.

This letter, together with the acceptance endorsed thereon by Terminals, constitutes an agreement between the two companies for construction on Wheeling's property of, first, an abutment wall along Canal Road northwesterly of Eagle Avenue to support bridging to carry the Terminals Company's proposed tracks across Canal Road at that point and at the southerly end and westerly end thereof two retaining or wing walls, and, second, a tunnel to accommodate electric cables, and, third, a tunnel to accommodate steam pipes. Terminals has commenced construction of these various walls and tunnels but no work was commenced prior to the acceptance of this letter by Terminals on June 19, 1928. Since such acceptance was endorsed upon the letter Terminals has carried on the work of constructing these walls and tunnels in accordance with the terms contained in the letter agreement. [This agreement specifically provides in detail for the location of each of the tunnels, both as to horizontal location and vertical location of each part thereof. Section 1 provides that the construction of these walls and tunnels shall be completed not later than February 21, 1929, and that the rights of the Terminals under this agreement shall cease after that date. Section 6 contains a provision for indemnity of Wheeling. The contract contains provisions for indemnity at Wheeling's option in case Terminals damages or destroys the Ontario station in the course of the work. Section 7 provides for the payment of a reasonable compensation for the rights given thereby. Section 10 contains a provision

denying the Terminals any interest in the lands of Wheeling on account of construction work. This is similar to the provision in Exhibit 63.]

A letter dated November 12, 1928, from the Wheeling and Lake Erie Railway Company to the Cleveland Union Terminals Company, accepted by the Cleveland Union Terminals Company on November 13, 1928, concerning the installation of electric cables in the tunnel constructed for that purpose under the letter of June 15, 1928 and accompanied by a letter from Mr. H. D. Jouett, Chief Engineer of the Cleveland Union Terminals Company to Mr. Durham, dated November 12, 1928, was marked "Applicant's Exhibit No. 65, Witness Jouett," identified, offered and received in evidence.

This letter provides for the installation of steam pipes and electric cables in the tunnels constructed for those purposes. Aside from these various agreements, Exhibits numbers 62 to 65, inclusive, I know of no instance when Terminals has gone upon the property of Wheeling without permission to construct anything or do any work, or for any other purpose. As chief engineer of Terminals I would be familiar with any such act on the part of Terminals should it have occurred.

[Frank M. Crutsinger, called as a witness for applicant, being first duly sworn, testified as follows:

Direct Examination by Mr. Martin.

I reside at 1324 West 108th Street, Cleveland, Ohio, and I am Vice President of the Van Blarcom Company, which is engaged in building construction with principal offices in Cleveland, Ohio. We have been in business in Cleveland about ten years, in which time we have made alterations in such buildings as the Hollenden Hotel, the Union Mortgage Building, the Union Club, the Cuyahoga Building, the National City Bank Building, and other buildings in Cleveland, all located in Cleveland's downtown business section. My company has engaged in the construction or the alteration of important buildings elsewhere, and employs anywhere up to an average maximum of 1,000 men, sometimes employing as high as 2,500 men, sometimes a minimum of 25, the latter including engineers, designers, construction men, etc. I am speaking only of field forces, not the main office. The latter consists of about ten on an average, all of whom are construction men and engineers.

My personal experience as an engineer in the construction of buildings commenced with the City of St. Louis on the Board of Public Improvements where my duties were running lines and levels for buildings and utilities, making up estimates of the cost of the work completed and the work to be performed. Leaving St. Louis I was employed by James Stewart & Company, Inc., whose main office is in New York City, starting as an engineer on construction work. Between jobs in the field I was employed in the office on design and estimating. Afterwards I was made superintendent and had complete charge of the construction of buildings in the various parts of the country. I left James Stewart & Company in 1909 and associated myself with Mr. Van Blarcom in the organization of the Van Blarcom Company with which I have been associated since 1909. My duties in the office are to have charge of all estimating and engineering and oversee the accounting, and I also have charge of the outside construction and alteration work. I superintended the construction of a station for the Union Pacific in North Platte, Nebraska, was connected in a small way with the construction of the B. & O. Chicago terminals, this not including any station work. I was requested in the latter part of December, 1928, by the vice president and general manager of Wheeling to inspect Wheeling's Ontario Street station in order to determine its present condition and its probable future life and the cost and feasibility of altering or repairing it. My instructions from Mr. Durham as vice president and general manager of Wheeling were to make an inspection of the building and to give him an estimate of the cost of repairing the same, and I was asked to make a fair and impartial report and estimate. Pursuant to that assignment I personally inspected the building and prepared such an estimate. My assistants and I went to the building and started at the ground floor or track level. We inspected the structural part of the building and its mechanical equipment, working on up to the roof.

We found two cracks in the concrete retaining wall on the Ontario Street side, one crack in the brick wall near the elevator shaft. We found the ground floor very uneven and badly worn, the beams on the first or mezzanine floor shored with old piling visible in the ground floor story. We found the building lined practically throughout with matched and beaded ceiling, badly warped and loose in certain places; the sash in the windows practically loose and some badly warped; considerable glass missing; doors sagged and

badly worn; and the wood floors in the waiting room and the first floor proper badly worn, the worst spot being in front of the ticket office window, the finish floor being almost worn through.

On the exterior of the building we found the stucco cracked and falling off in certain spots; the upper part of the structure out of alignment and out of plumb; the corner boards decayed in certain parts and loose; an indication of leak in the main roof and the canopy roof; and the canopy brackets fastened to the brick wall loose in certain parts and pulling away from the wall. We found the ceiling and stud walls to the boiler room were not fireproof. The steam supply lines and return lines were not covered, particularly those supplying the coaches where there is considerable loss of steam; the plumbing fixtures while operating were obsolete. The insulation on the electric wiring was cracked and falling off, and the present elevator used by the baggage master was obsolete.

The building is tied together by wooden trusses in certain parts and elsewhere by iron truss rods and these are exposed in the waiting room. Non-covering of the steam pipes is not a hazard but the condition of the electric wiring I would consider a hazard. The building is not fireproof but is within the inner fire limits of Cleveland. The Building Commissioner of the City advised me that he would not issue a permit to make repairs to the building such as would prolong its life, and before so advising me he went over the building very thoroughly with me. My application to him for a permit to make repairs was verbal. The Building Commissioner assigned as a reason for his refusal the fact that the original permit was issued for a building to be razed at the end of one year and before he could consider issuing a permit for repairs that would prolong the building he would have to make an investigation himself. A day or two after such investigation he advised me that he would not issue a permit for repairs that would prolong the life of the building. In my opinion some repairs are required for this building within the near future, but speaking generally I would say that the walls should be strengthened and new stucco should be applied in certain places, the roof and the floors should be repaired and the electric wiring should be taken care of. Those are the major items.

As a result of my investigation, I prepared and submitted to Wheeling a report under date of January 15, 1929, setting forth my findings and a detailed estimate of

the cost of alterations and repairs to this passenger station. The report referred to was marked "Applicant's Exhibit No. 66—Witness Crutsinger," identified, offered and received in evidence.

In my opinion it would be advisable or necessary to strengthen the floors. In the work done by me I proceeded the same as we do on any other repair job, and it is not at all unusual for my company to be asked to make such an inspection and estimate and to carry out work of altering a building of this general character. The buildings in Cleveland mentioned by me on which I have done work are all shown upon the map of the downtown district of Cleveland admitted in evidence as Exhibit No. 12.

Cross Examination by Mr. Hoppe.

At the time of my employment Mr. Durham told me he wanted to make some repairs and alterations in Wheeling's building and asked me if I would look it over and give them an estimate of the cost. I don't recall his saying anything further. He did not say at that time that Wheeling had entered into an agreement to sell this property nor anything about Terminals needing the property nor about wanting me to testify in respect to my conclusions. He first talked to me about testifying as to my conclusions about a week later, after I made my first report but before the report offered here as Exhibit No. 66 was made. My preliminary report was verbal and Mr. Durham said nothing to me about going to see the Building Commissioner. I was prompted to see him because that is our regular procedure when we have an alteration job—to ascertain whether or not we can obtain a permit. From our experience in building we know certain buildings come within the fire limits and certain buildings cannot be repaired owing to certain conditions, and the first thing we do after making a preliminary survey of the building is to find out whether or not we can obtain a permit. I went to the Building Commissioner after my preliminary survey and after I had reported the results thereof to Mr. Durham, so it was after Mr. Durham told me that he wanted me to testify with respect to the repairs that I went to see the Building Commissioner but he did not tell me about having agreed to sell the property.

It is not necessary tc put new floors in to strengthen the building but it is advisable to put new floors in owing to the condition of the present floors. It is advisable to strengthen the supports in the floors, that is, the beams,

particularly since the floors as they exist are not capable of carrying the load as required by the building code of the City of Cleveland. This code requires 70 pounds per square foot and the present support of the floors would carry 60 pounds. I made some figures on it myself and then had a structural engineer, Mr. Hick, of Hadlow, Hick, Hughes and Conrad Company, architects and structural engineers, check the floor and give me a report. The floor is now braced and supported by wood joists resting on wood beams and wood posts, the posts being all distances apart and shored temporarily. Some of the original posts have been taken out and piling put in to replace them. Some wedges have been put in between the piling and the floor. The piling is spaced anywhere from 3 to 5 feet. The original size of the piling and floor supports was probably 10 inches at the butt and 6 or 7 inches at the top but they have been worn off in between and there are indications of decay, so they are not what they should be. I have in mind particularly the piling in the baggage room, where trucks are pulled back and forth between the piling. The wear and tear on the piling was just about at the height where the bed of the truck would bump against the piling and chew a piece out. Where the wood beam rests on the wood posts there is an indication of decay at the top of the posts and where the beam bears on the top. I did not climb up to the top of these supports to find out whether there is any decay, but I climbed up on one of the trucks in the express office. The indication of decay was from just looking at it. It looked like a decayed piece of timber, dark brown in color. I noticed no decay or worn parts in any of the supports of the floor in any other parts of the building aside from the baggage room. The floor joists are 2 by 12 by 14 feet long, spaced on 14-inch centers. There are iron rods in the waiting room and the second story. It did not look as if the second story of the building was used by passengers or patrons. The roof is covered with roofing felt placed on the sheeting in strips and the main roof showed indications of leaks in several places. I do not know how many; I did not count them. The canopy roof is a composition roof.]

(Adjournment)

January 23, 1929.

An agreement dated December 8, 1928, between Building and Terminals was marked "Applicant's Exhibit No. 67, Martin, Counsel," identified, offered and received in evidence.

Mr. Martin: This agreement is in brief an agreement whereby Building assumes all of the obligations imposed upon Terminals under sections 1 and 2 of the contract of December 7, 1928, between Terminals and Wheeling, which is in the record as Exhibit 3, Part 3, of our application in Finance Docket 7298. Its general purpose is to shift from Terminals to Building the expense of the operation by Wheeling into the Superior Avenue station of Erie. This contract is the final step, in that Wheeling made contracts with Erie and Big Four for the temporary use of their tracks and station, and Terminals agreed to save Wheeling harmless from the liabilities imposed upon it under those contracts. Now Building agrees to save Terminals harmless from these liabilities.

The Applicant rests.

W. M. Duncan, called as a witness in behalf of interveners, being first duly sworn, testified as follows:

Direct Examination by Mr. Hoppe.

I reside at 2028 East 88th Street, Cleveland, and occupy the position of Chairman and President of Wheeling. I was President after Wheeling's organization about December 14, 1916, at least during the war. After the war I became Chairman and President, and then for an interim of two years in 1921 and 1922 I was Chairman. Since then I have been Chairman and President. While I was Chairman only in 1921 or 1922 Mr. S. Ennes was President.

Conversations between Wheeling and Terminals for the acquisition by Terminals of a right to use Wheeling's Ontario Street passenger station site or buy it started about 1918 during the war, at which time the Director General through the Regional Director, Mr. A. H. Smith, started an investigation of the passenger station situation in Cleveland. I was called into it as the representative of Wheeling, not as the representative of the operating forces, Mr. McAdoo having a federal manager for Wheeling at that time. I have forgotten the names of the people who constituted the committee, but I think the Federal Manager of Wheeling, a Mr. McMaster, was a member, although I am not positive. He may have had his chief engineer, W. L. Rohbock, as a member of the committee.

The committee made an investigation in which I took no part because all I deemed it necessary for the corpora-

tion to do was to see that it was reserving any rights it had and was not intending to permit the federal administration to make commitments for it in that respect. We realized in war time we had to acquiesce in whatever the governmental forces were doing. The committee made a report, the substance of which resulted in the recommendation of a station such as is in process of construction, namely, a union station on the Square as distinguished from one on the lake front. Wheeling had no part in that other than to protect what might be the corporate interests pending the termination of the war. Upon the termination of the war and prior to the return of the property to Wheeling, I had several casual talks with Mr. A. H. Smith in which he said he thought Wheeling should come into the station. I told him that I was not sufficiently informed as to the station project and, of course, could not answer one way or the other. I told him I had one objection to the report that I had seen in that it apparently proceeded upon the assumption that Wheeling could afford to live in a palace and that its revenue put that out of the picture.

I had a few discussions with Mr. O. P. Van Sweringen as to the terms and conditions upon which Wheeling could enter the station. At the time I first talked to Mr. A. H. Smith he was the Regional Director for certain lines east, acting under Mr. McAdoo; and when I talked with him next the properties had been returned to the companies and he as President of the New York Central was in charge of all the activities of the New York Central. When I talked to Mr. O. P. Van Sweringen he was either chairman or president of Nickel Plate and was apparently acting for the New York Central, the Big Four and Nickel Plate, which were apparently partially committed to this project. I do not know what capacity he was acting in. My first talk with Mr. Van Sweringen was some time in the latter part of 1919. I do not recall discussing the matter in 1918 or 1919 with anyone else interested besides Mr. A. H. Smith and Mr. O. P. Van Sweringen.

The terminal project had apparently taken some corporate character in 1920. Various estimates or various studies had apparently been made by what you might call the terminal interests—not intending to fasten that upon either Mr. Van Sweringen or any one else, but simply using that as a general term. And I had several talks with Mr. O. P. Van Sweringen in 1920 as to the terms upon which Wheeling might see its way clear to join in the enterprise. Nothing resulted because the terminal interests were taking

he position that Wheeling should pay, if it went into the tation, its proportionate share of the enterprise, both apital as well as operating, upon a per car basis. I do not now whether Mr. Van Sweringen gave me any figures as to vhat that percentage might be. I think it was apparent rom the report. My recollection is that it would require Vheeling to pay about 5 per cent; possibly a little less or nore. The conversation developed that if Wheeling beame what is known as a proprietary line, that is, an owner f the stock, and our costs were based upon the proportion hat our cars bore to the total number, we would probably ave anywhere from $175,000 to $225,000 per annum to ay for the use of the station, (this being based upon an stimated cost of the station of $60,000,000) and that having eveloped, Wheeling took the position that it could not aford to come into the station upon those terms. These gures were based upon the method suggested at that time, amely, that here are four railroads, there are so many cars oming in, you have so many, and your percentage should be s the 20 or the 14 or the 15 bore to the whole. I pointed ut to them at that time that Wheeling could not afford to ome into the station on that basis and I did not think it vas fair to charge that amount against Wheeling because Vheeling's average haul of passengers at that time was robably less than 50 miles, while the Nickel Plate, Central nd Big Four probably had a very much longer haul and to ndertake to distribute among us the cost upon a per car asis was inequitable. The figures given were my estiates; they were claiming it would cost less, but I was aking the position that if it was to cost less I should have a uarantee, at least, that Wheeling's cost would be reduced nd I was insisting at the various conferences that I could ot see how Wheeling could come into the station upon any ther than a flat basis so that we would know what it would ost us. The figure of $175,000 annually which it was esimated it would cost Wheeling to use the new station did ot, according to my recollection include Wheeling's proortionate share of maintenance and operation.

My recollection is that the matter was dropped so far s Wheeling was concerned in the latter part of 1920. In he early part of 1921 Mr. O. P. Van Sweringen and I again alked about the matter with no different result. Some time n February or March, 1921, Central, Big Four and Nickel Plate filed an application with the Commission for a cerificate of public convenience and necessity to build the epot. Having learned that and having obtained copies of

the application, Wheeling gave consideration to the question of intervening and protesting and later filed an intervention and appeared before the Commission and our action in that respect is a matter of record. The applications were at first denied, but upon rehearing and some time in the latter part of 1921, the certificate was granted.

The matter between Wheeling and Terminals rested from that time, as you might say, until 1922, and the early part of 1923, except for some discussions that took place between myself and the operating department as to whether or not it would be advisable for Wheeling to undertake to secure joint or separate freight facilities on what is known as the high level region in Cleveland. The river level is called the low level of Cleveland.

We have a freight station at Commercial Street which is treated as a low level station. We were undertaking to determine whether it would be wise on the part of Wheeling to join in the upper level freight station that was being promoted, apparently by Central and Nickel Plate. At the present time I do not recall having any discussion regarding the terms and conditions upon which Wheeling might enter the new station. I think the new station project was somewhat at a standstill at that time, so far as construction is concerned.

Mr. Durham came to the company some time in the spring of 1923. I asked Mr. Durham in the summer or latter part of 1923 to look into the freight situation, and some time in the latter part of that year or the first of the following year, 1924, I had a number of conversations with Mr. Durham and his subordinates. I think I had a conversation with Mr. Bernet, then president of Nickel Plate, since we would have to utilize the Nickel Plate tracks if we went in on a high level freight station. Mr. Durham pointed out to me, some time in 1924, that Wheeling could not afford to acquire a high level freight station in the manner in which it had been suggested by either Mr. Ennes or Mr. McMaster, his predecessors, pointing out the difficulties from an operating standpoint and the excessive cost from an engineering standpoint. So that by the summer of 1924 the company had adopted the policy or adopted the theory that it could not see that there was anything in the high level freight station that was promoted apparently by the Nickel Plate and in which the terminal interests apparently had secured land or something. I was not familiar with the details.

I do not think I ever advised Mr. Van Sweringen of our clusion in that respect in 1924, but I do think I told . Bernet. At any rate, in the latter part of 1924, Mr. n Sweringen came over to see me and said that his pas-ger station was reaching that stage where it was ad-able to make some kind of an arrangement with Wheel- and he would like to resume the conversations that had ply quit a year and a half or two years before. That was . O. P. Van Sweringen. He had some maps with him at t time and some sketches, and we discussed the question to whether Wheeling could not move to the left, or the st, and the terminal project could not move a little to the ht, or the east, so as to avoid the necessity for separation grades. He said he would give that consideration. I do believe any terms were mentioned. We were talking re about physical possibilities. Some time during the t of October he either came to see me or called me on the ephone, I do not know which, and said he thought some-ng like that could be worked out. In the latter part of tober, 1924, we had a meeting in his office, or the adjoin- office in the Marshall Building in Cleveland, simply be-se or largely because he had more maps over there than arry in my office, and at that time we discussed three or r matters.

First, the matter of the division of lands occupied by eets which would revert to both parties in the event se streets were vacated. He claimed that Wheeling's e to the property extending into Huron Road was in-id; that consequently Wheeling had no property at that nt to throw into the transaction. He was also claiming t our title to a triangular piece of land between Old negar Hill or Canal Road, I do not know which it was at t point, was a part of the street and did not belong to us. ere was about a half foot at one end and about 15 feet at other, probably 150 to 200 or 300 feet long. He also imed that there were some other defects in the title, and nsequently that those were things that ought to be dis-sed of. I said I thought they should be disposed of before would be in a position to determine how we would ex-nge our lands and whether or not we would lease or sell give a right underneath, retaining the right above.

We discussed at that time the levels and the grades, and ave a very definite recollection that I said we possibly ld separate grades at that point by coming up from level or 65, the present level of our tracks, to level 73; that uld cost us considerable money as we would have to start

back at Commercial Street to make the grade, and I
him that we would expect him to bear that expense if
did so. I pointed out to him that our clearance under
Central Avenue viaduct to the north of the Commer
Street freight station was a limiting factor, and we
recognized that.

We finally jotted down a tentative plan, not inten
to be binding upon either party, but merely for purpose
the discussion. This was a memorandum that I dict
to a stenographer who came in at that time, and it re
to Terminals and Wheeling. The tentative memoran
provided among other things that the lands then occu
by streets which were to be vacated by this project sh
be divided equally between Terminals and Wheeling.
had a map at the time and there was considerable ques
in my own mind as to the extent to which we might be
titled to these lands as abutting owners, because of
peculiar shape of the area, it being somewhat like deter
ing whether your rights on Lake Erie extend out north
south, or whether they go this way, to the right or to
left, and I suggested that in order to eliminate a con
versy it simply be divided in half. And Mr. O. P.
Sweringen drew a line right across the area and said, "
that satisfy you?" I said, "Yes, sir, I think that wo
but I can see that it is necessary for the engineers to w
out in detail just what that means. This is a blue p
and the areas must be established by surveys, and
must accept for purposes of this what we claim to be
land, that is this property out in the street." We discu
that phase of it. There was some merit, as I though
his position, and I finally said, "As to this piece of p
erty that projects into the street, my suggestion is to
us split the controversy on the basis of 75% to Whee
and 25% to you, because it is apparent that it goes
the new street." And that satisfied him.

The old ordinance provided for a widening of Ont
Street in front of Wheeling's property and land south th
of. I suggested at that time that we would contribute a
tion of the area necessary for widening the street. I
forgotten whether that was 25% and 75% or whethe
was 85% and 15%. I concluded that it was to our ad
tage to have the street widened at that point if perch
we were to construct a station at a grade over the prop
grade of Terminals.

The tentative memorandum also stated that Whee
would grant Terminals an easement under its property
on the theory that Terminals would so construct its sub

at that point as to accommodate on top of it a building which we thought we might wish to put up. That was assented to by Mr. Van Sweringen conditionally, that is, he said he did not quite understand what kind of a building we wished to put up, and I told him I was as much in the dark about that as he was, but we were trying to work out a plan whereby we could keep our tracks at level 73 and he could keep his tracks at level 52. No consideration was expressed for the proposed easement for the reason, as I recall it, that we concluded that if we had our substructure up to this point—in other words if his tunnel was so constructed as to bear some weight, we would be relieved of the necessity of going down just that much deeper to maintain our own building, because if we maintain a building at that point and Terminals are not there, due to quicksand conditions that prevailed, we would just have to go down that much deeper.

The memorandum also stated that Wheeling would go into the station with so many cars per annum, with so much per car, something like that, and all those were left blank because we could not agree upon that. I was taking the position that if we went into the station it would have to be for some sum not to exceed what the Wheeling might be paying for its own station at that time.

The result of that tentative memorandum was a number of conferences between the engineering departments of Wheeling, and, I assume, of Terminals, and their operating departments, of which I was acquainted through 1925. I came in contact with Mr. Jouett on one or two occasions. Those matters, however, were being taken care of by Mr. Durham rather than by myself. I was receiving the information from him. There was a good deal of controversy between the two parties, you might say between the engineering departments of Terminals and the engineering departments of Wheeling. As a matter of fact, neither party has agreed yet. There is a difference between us of some three or four thousand square feet. But at any rate that year of 1925 was taken up with a firm effort to try to get together as to the acreage or as to the spaces that would be divided between us. At the latter part of 1925, maybe it was the summer of 1925, the Eagle Avenue Ramp situation, so-called apparently became acute, as a controversy between the Terminals interests and the City interests.

In the latter part of 1924 Wheeling and Terminals had been giving some consideration to the extension of Scranton Avenue in such a fashion as would utilize Canal Road in this way: You would come from West 3rd Street along

Scranton and then would start up a ramp or viaduct
wards the south, reaching a level of 90 city datum ab
the time you reached the property of Wheeling imm
ately to the west of its station, and south of its station,
then crossing overhead to Ontario Street at its level of
city datum and then Canal Street, at a point about wh
Vinegar Hill intersects it, would start down to the Illu
nating plant, as you see it in these various pictures that h
been exhibited. For the purposes of this record I will
this proposed viaduct the Canal Ramp. That would h
permitted Wheeling to have constructed its tracks and
tion at a level of 72 with Terminals' track at level 52,
would have left for consideration only the question of w
should be paid for Terminals' easement at level 52.

Some time either in the summer or the latter par
1925 a controversy between Terminals and the City
Cleveland became acute, the city taking the position tha
lieu of the Canal ramp there should be substituted
Eagle ramp. Considerable controversy existed in
Council at that time. The city authorities were also in
ested in the relocation and the straightening of the Cu
hoga River and Terminals was claiming that the propo
straightening would interfere with some of the support
piers for the viaduct crossing the flats which forms a
of the western approach to the station.

I am not familiar, of course, with the extent to wh
Terminals may have had negotiations with the city on
subject other than to this extent: Sometime in 1925, s
city committee invited me to a conference to discuss
question as to whether it should be the Eagle ramp or
Canal ramp. I do not recall having attended the confer
because it is my recollection that it was subsequently ca
off. Later Mr. Hopkins, the City Manager, talked with
about it. He said that it was very essential for the cit
secure the Eagle ramp instead of the Canal ramp w
would permit Wheeling to have its own station at that p
and he said that Wheeling must accede to what the
wanted. I pointed out to him that it required changing
grade of Wheeling's track at Eagle Avenue and poi
out to him that if Wheeling changed its grade at that p
Wheeling would be prevented, from a physical standp
and from a practical standpoint, from putting a sta
over and above the proposed tracks of Terminals. He
parently had some conversation with Mr. Van Sweri
because one day he called me up and said he wanted to
me and he wanted me to come down to the city offic
went down there and he told me that he was insisting

Terminals consent to the construction of the Eagle Avenue ramp at their expense in lieu of the Canal ramp, and that Terminals had told him the only person that prevented that from being accomplished was myself. Manager Hopkins said that if I wanted to take that position with the city, he thought I was acting very unwisely both from the standpoint of a citizen as well as an officer of the company. I thanked him for his advice and told him that we would have to give it consideration. Mr. Hopkins asked me if I would not get in touch with Mr. Van Sweringen. I told him I would, and I got in touch with Mr. Van Sweringen, who said that he did not know how to answer the question. He recognized that the lowering of Wheeling's track at Eagle Avenue made it impractical for Wheeling to construct a station above. He was endeavoring to see if it could not be worked out by Terminals throwing the tracks over into Ontario Street a little further, leaving Wheeling some leeway on the west.

I was going away on my vacation at that time and I remember that we called up Mr. Hopkins from my office and I told Mr. Hopkins of our conversation and that I would appreciate it if he would defer any action in the matter until my return some time in March, 1926. Mr. Van Sweringen spoke to him at the same time and told him that he was having difficulty in reconciling the entangling alliances—I do not think he used those words—that would result from the construction of the Eagle Avenue ramp. I think part of that Eagle Avenue ramp had been built at that time, Terminals, as I was advised by either Mr. Hopkins or Mr. Van Sweringen, being under an obligation to do so.

When I got back in the latter part of March, 1926, Mr. Van Sweringen and I got together again and we spent practically all that summer trying to devise a way whereby we could put Wheeling's station alongside of Terminals' tracks, or find some way to get it on top of Terminals' tracks. In the meantime I was of course consulting Mr. Durham, keeping in close touch with him, and receiving from him the advice and information as to the possibility and feasibility of various sketches and things. In the fall of 1926 I reached the conclusion that there was nothing for us to do but go into that station. I then proceeded to say to Mr. Van Sweringen, "Now, you have a very embarrassing situation. We are undertaking to determine how much land we have, and our engineers have not agreed, and it is exceedingly important that we get together as to what land the Wheeling will have in the event your project goes through." That is, for the purpose of determining upon

what basis it should go into the terminal project, that is, whether we should give them merely an easement rather than the areas; what if anything we should charge them for the easement, and also what if anything we could afford to pay to go into your station, the things being somewhat intermingled. We could not afford, according to my expression, to enter into any agreement with respect to an easement to be effective which would prevent us from having a station, until we knew where we were going.

In the fall of 1926 the city took the position with me that Wheeling must consent to the ordinance in respect to that Eagle ramp and that if we did not consent the city itself on its own initiative would take such steps as were necessary, indicating that they either had the right to cause an abandonment of that street or to cause a change of our grade. I was rather inclined to believe that in law they had that right. I explained the situation to Mr. Hopkins. He said that it was unfortunate but there was not anything left for the city to do but to take whatever steps might be necessary to have that ramp completed, and he was insisting that it be completed at as early a date as could be. We did not do anything further in the matter in 1926 with the city. My recollection is that the construction of the ramp had started. In 1927 we were undertaking to learn how the property should be divided. In the fall of 1927 the city solicitor told me that he had received instructions to take such steps as might be necessary so as not to delay the completion of the Eagle ramp, and that meant that the Wheeling must either reduce its grade voluntarily or that the city would take such action as was necessary. I discussed the matter with all the officials of Wheeling and we reached the conclusion that in view of the many interests in the city, shippers and relations of all kinds, and in view of the fact that the Terminals project, no matter what the opinion may have been in the earlier stages, had become a fixed idea in the city of Cleveland, it was not wise for us to continue to play what was not intended to be but what might be characterized as a holdup on our part of the city.

I do not know whether our counsel or I suggested that we enter into a contract with Terminals under which we would agree temporarily to lower our tracks under the Eagle ramp in order to permit the completion thereof. That contract required Terminals to indemnify Wheeling against any loss or damage which Wheeling might sustain because of its concession. The contract was drawn in that form for the purpose of reserving to Wheeling any claim it might have for damages due to the changed grade in

the street, and so as to prevent the contract from being construed as a waiver by Wheeling of any claim that it might have against Terminals, or as an admission against interest that would prevent us from insisting upon certain terms and conditions. Counsel so drew the contract that Terminals could not use it as a basis for estoppel. I do not know just when that contract was executed, but upon its execution it was treated as a consent to the ordinance that provided for the construction of this ramp.

That contract having been entered into, I said to Mr. Van Sweringen, "Now, it is perfectly apparent that the Wheeling has not the alternative of constructing a station at that spot, and our negotiations from now on must be conducted upon the basis of our being furnished with a station, which means that we should be permitted to come into the Terminals station."

From that time on until July 1928 the various departments of Wheeling were engaged in trying to figure out what would be a proper division of the vacated area because I had taken the position that in selling or in leasing or in granting rights one of the essential things on our part was to know the value of the piece of property that we had.

I do not think I discussed the matter with Mr. Van Sweringen any further, because at about this time Mr. Charles Bradley was elected president of Terminals and he took up the conversations that I had with Mr. O. P. Van Sweringen. I do not know when Mr. Bradley became president of Terminals. I dealt with Mr. Van Sweringen on the assumption that he represented Terminals. The conversations shifted from him to Mr. Bradley when Mr. Bradley apparently got into the saddle, so I commenced to discuss with Mr. Bradley the value of the property and we went through those discussions which ordinarily take place between two traders. At the same time Wheeling was making every effort to ascertain the value of the property. Mr. Bradley and I finally split, that is, he said the property was not worth what Wheeling was asking for it, and he also stated that he could not see his way clear to let us into the station for $20,000, our maximum. Trader-like, he requested higher figures, telling me on one occasion some of his people thought we should pay $60,000 and he did not think so, and I told him he did not need to tell me what anybody else thought; we could not afford to pay him $60,000.

In the meantime we were being pressed by the city to consent to a change of Vinegar Hill, to the change of Ontario Street, and we discussed that among the Wheeling officials and finally concluded that it was unwise to put ourselves in the position of opposing the city. So we entered into temporary contracts with Terminals, under which Terminals put them in, and in each of those cases protected ourselves so that those contracts could not be considered as admissions against interest. By those contracts I mean the contracts identified yesterday by Mr. Jouett. (Exhibits 62, 63, 64 and 65.) Other work that was done we also deemed it wise to consent to because of the public nature thereof and because it would not interfere with Wheeling's property either as a building or as a station or anything else, but we took the precaution to state in a letter that it should not be treated as admissions against interest.

Bear in mind that as soon as Wheeling reached the conclusion that it was in the interests of the company not to oppose the city of Cleveland in the construction of the Eagle ramp, that very moment it was impossible for Terminals and Wheeling to be in the same place with their stations. We discussed with Mr. Bradley during the first half of the year whether we should lease the property to them in whole or in part; or whether we should give them an easement for the tunnel retaining the air rights; or whether we should sell the property. Wheeling gave consideration to all these matters for the disposition of its property.

I took occasion to consult with counsel, other than the general counsel of Wheeling, counsel that had had considerable litigation with the terminal interests in condemnation proceedings and in negotiations concerning the values of real estate, in order to get his view as to whether the price that we had reached was a price that was the maximum that we could expect from a jury if the Terminal Company had the right to appropriate. I consulted with various people familiar with the value of lands. I had available various data that had been given to me by banking institutions in respect of loan values or sales of land there, and when we came to make our final recommendation to the executive committee the management, including myself, had that all before us, and we had reached the conclusion that the wise thing was to make these contracts.

During May and June we were writing the proposed forms of contracts notwithstanding we had not agreed either upon the valuation of the land or the amount that

would be paid for the use of the terminal. The parties to these proposed forms of contracts were Terminals, Wheeling and the Building Company. I had said to them that if we concluded to sell the property to them that I would require a guaranty that would be sufficient so that in the event of any controversy we could step in and get the money. The parties to these proposed contracts were the Cleveland Terminals or the Cleveland Union Terminal station or whatever the proper corporate name is and the Wheeling.

The question of whether we should sell or lease the property had not been finally determined by Wheeling until the early part of June. Consideration was being given to whether a sale or lease would be more advantageous to the Wheeling from the standpoint of taxation. The other side had indicated that this question was immaterial to it. Wheeling finally concluded that it was to its interest to sell rather than to lease in order that it might have the entire proceeds available through its mortgages for additions and betterments. I presume that during April, May and June when the tentative contracts were being drafted that sometimes it was on a sale basis and sometimes it was on a lease basis, but this ended sometime in June on substantially the present basis except that after the draft of lease had been presented to the Executive Committee and subsequently approved by the Board on July 20, as shown by the minutes, we discovered certain omissions or ambiguities which we considered necessary to have changed, and of course that gave rise to Terminals injecting some questions on its part. The ambiguities in which we were interested related to the right of Wheeling to include in the cars covered by the $20,000 rental cars that might come from Pittsburgh, if in the future it was thought profitable to have passenger cars run from Pittsburgh to Cleveland, and also cars coming from Connellsville, Pennsylvania, as the Wheeling has on a great many occasions and over a period of ten years considered the advisability of constructing a line across to Connellsville for a connection with the Western Maryland. There were some other things. I felt it was advisable to submit to the Board the contract with the modifications, and this was done sometime in November, in such form that the Directors could see at a glance wherein the original draft of contract had been modified. The user contract in its modified form was approved by the Board, as indicated by its minutes.

According to my recollection the sale contract was changed in one particular. As approved by the Board at its meeting in July, it imposed upon the Wheeling the obliga-

tion of conveying its property to the Building Company by warranty deed free and clear of all encumbrances. That provision was contrary to my earlier understanding with Mr. Bradley that Wheeling would convey or lease to Terminals only what Wheeling had; that is, it would convey by special warranty deed warranting against such encumbrances as Wheeling had placed upon the property. This modification was rather important to Wheeling as upon one piece of property there is a difference of opinion as to whether there is a cloud upon the title. I do not think so, but other lawyers think there is one. In order to protect the Wheeling we injected that modification into the contract. We were not interested in whether we would sell to the Terminals Company or to someone else—the Building Company. The statement had been made to me that it was the obligation of the Building Company to convey to Terminals the easement and that in such circumstances Terminals could not take the title to the property as it was only to receive the easement, and Mr. Bradley suggested that he would cause either the Building Company or some other company connected with it to enter into the contract for the sale. We then discussed the financial responsibility of any company that might make such a contract and he thought he could induce the Vaness Company, which has figured a great deal in the Terminals situation, to guarantee any commitment that was made.

The Executive Committee at its meeting of July 3, 1928, recommended that the property of the company northerly of Eagle Avenue be sold for $1,600,000 to Terminals or to such other person or persons on its behalf as it may designate, for the reason that Mr. Bradley was unable to say at that time who the buyer would be, apparently because he had not determined whether the contract for sale should be made with the Building Company or with some other company, but in any event it was to be guaranteed by the Vaness Company

Exhibit No. 48 is a report that was submitted to the Executive Committee at its meeting on July 3, 1928. Exhibit No. 7 was submitted to the Executive Committee and to the Board of Directors at the meeting of July 20th. Following July 3rd there was a Directors' meeting held on July 11th, and at the July 11th meeting the minutes of the Executive Committee meeting of July 3rd were read to the Board of Directors, and after consideration the minutes were approved. I do not know whether Mr. Frank Taplin or Mr. Farrand Taplin were present at that meeting or not, but I think one or the other or both of them objected

to the approval of the minutes of the Executive Committee on the theory that it might be an approval of the recommendation of the Executive Committee, and thereupon a discussion arose that consumed considerable time and no action was taken by the directors at that meeting upon the 11th, as Mr. Frank Taplin was suggesting that the matter be deferred for 30 or 60 days.

I cannot say whether, between July 3rd and July 11th, a resolution was prepared to be passed by the Board of Directors approving the action of the Executive Committee taken at its meeting of July 3rd with respect to the station matter, but there were a number of resolutions, whether prepared by me or by Mr. Martin in our office, that looked toward the consummation, as you might say, by the Directors of the recommendation of the Executive Committee calling for the approval of the user contract and the sale contract, but the discussion that took place at that meeting was somewhat heated, and as a result Mr. Tomlinson, one of the Directors, made a motion to adjourn. My recollection is that some director introduced some resolution that brought up the discussion I am referring to, but that resolution was not adopted and was not acted upon as you will not find it in the minutes, and I ruled that inasmuch as no action has been taken upon it it was not properly in the minutes. The resolution or portion of it which the minority interests have quite persistently since that time attempted to get into the record contains nothing to be ashamed of. In my opinion the resolution should not be in the minutes of the company as no action was taken thereon. The paper which you hand me (Exhibit No. 84) is the resolution which was offered at the meeting of July 11th upon which the discussion was had.

Between July 11th, 1928, and July 20th, 1928, I do not recall the exact date, I discussed with Mr. Bradley the name of the purchaser of the property and he had by that time secured some information for me that I had requested as to the financial condition of the Building Company and, I think, of the Vaness Company also, wishing to satisfy myself as to their financial ability, and I communicated that fact to counsel who drew the contract as you find it in the minutes of July 20th. I asked that the sales contract be put in the form of an option because I appreciated that possibly the Commission had jurisdiction over a portion of the transaction and I wanted Wheeling to be in a position where it could secure the proceeds of the sale simultaneously with securing the benefits of the user contract. The sale contract was drawn in two or three different

forms until the final draft is as you find it. We did not want to sell this property or be under any obligations to sell the same unless we had a contract that would be approved by the Commission in respect to the right to use the Terminal station and also the right to use temporarily the facilities of Big Four and Erie.

In my talk with Mr. Bradley between the 11th and 20th days of July, 1928, I do not think I said anything to him about the protest that had been interposed at the meeting of July 11th, and I am certain that I did not discuss with him or any of Terminals' attorneys the provisions of the Ohio Code to which that protest referred. I talked with Mr. Horace Andrews, a member of the firm of Andrews and Belden, Cleveland lawyers who have a good standing, and particularly discussed the validity of the protest made by Mr. Taplin which appears in the minutes of July 11th, and Mr. Andrews gave the matter consideration and advised me that the statutes in question did not apply to the situation. I also talked with Mr. Martin about the matter and it is my recollection that I also talked with Mr. W. C. Boyle, a lawyer, who is one of my associates in the firm of Squire, Sanders & Dempsey.

[redacted] Adjournment.

January 24, 1929.

At the time Mr. Durham and I signed the agreements with Big Four, Erie, Terminals and Building they all had been executed by the other parties to the contracts. My recollection is that Mr. Durham and I executed all of the contracts at the same time. In reference to how the $20,000 per annum as specified in the agreement between Wheeling and Terminals was arrived at, it was somewhat arbitrary. The vice-president and general manager had been requested by me at various times to give me the benefit of his knowledge as to the out-of-pocket cost, as you might say, in connection with the operation of Wheeling's station because I recognized that the amount that Wheeling could pay must bear some relation to what it was costing as well as to the revenue that was being derived from that station. The vice-president and general manager told me, in the first instance, it might cost $15,000 or $16,000. He then undertook a more detailed study, I presume in connection with the accounting department, and subsequently told me that it would cost at least $20,000 to operate Wheeling's station, and I just took the position that $20,000 was our maximum for the use of Terminals' facilities. Neither I

nor our operating department ever figured the cost to Terminals of furnishing the facilities which they agreed to furnish as we were not interested in that end of it. The limit that Wheeling could pay, in my judgment, to get into the station is the amount that I have fixed, $20,000, and Wheeling could not afford to pay more than that for the service that is mentioned in the contract. The fact that the use of the terminal facilities was figured at $20,000 was not taken into consideration in arriving at the sale price of $1,600,000 for the property. I tried in the ultimate analysis to determine what was a fair and reasonable value for our property and in doing so I secured the advice and information to which I have referred in my earlier examination, and the directors, in the end, or the Executive Committee, to be more accurate, took the position that we should say to Terminals that it was $1,600,000 and that we would not negotiate the matter on any other basis. In arriving at this figure of $1,600,000 we gave no consideration to the $20,000 rental specified in the user contract. That was as much as we could afford to pay and had nothing to do with obtaining the fair value of our land.

The action of Wheeling in entering into the contracts with Big Four, Erie, Terminals and Building was not submitted to the stockholders of Wheeling.

The operating of Wheeling into either the Erie station or the new terminal station will not require any changes in Wheeling's passenger fares. Wheeling's passenger fares are fixed by its competitors and I am sure we could not make out a case for an additional charge. My answer is based upon the knowledge that there cannot be two or three lines carrying passengers between the same points at different rates of fare.

By Mr. Hoppe: May the record show that the Baltimore & Ohio Railroad Company is a railroad corporation organized under the laws of the States of Maryland and Virginia, and duly authorized to do business in the State of Ohio; that The New York Central Railroad Company is a consolidated railroad corporation, consolidated under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois; that The New York, Chicago and St. Louis Railroad Company is a consolidated railroad corporation, consolidated under the laws of the States of New York, Pennsylvania, Ohio, Indiana and Illinois; that The New

York Central Railroad Company owns 91 per cent plus of the common stock and 85 per cent of the preferred stock of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a railroad corporation organized under the laws of the States of Ohio and Indiana.

By the Examiner: The record may so show.

CHARLES W. STAGE, called as a witness in behalf of intervener, The Pittsburgh & West Virginia Railway Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Hoppe.

I reside at 2865 Winthrop Road, Shaker Heights, Cleveland, Ohio, and I am Vice President, Secretary and General Counsel for Terminals. I have been Secretary ever since the company's organization in August, 1918; General Counsel ever since January 1, 1922; and Vice President for about two years. Some time in 1921 Terminals proposed to enter into certain contracts with Central, Big Four and Nickel Plate with respect to the erection, construction, operation and maintenance of the union depot in Cleveland which it was proposed that Terminals should build. A certificate of public convenience and necessity was granted in Finance Docket 1237 on December 6, 1921, and on December 8, 1921, the proposed contracts between Terminals, Big Four, Central and Nickel Plate were executed.

Terminals in the construction of its depot is building what is commonly referred to, and is referred to on the plans and specifications therefor, as the easterly approach and the westerly approach. The westerly approach extends from the westerly limit of the station area to about West 40th Street and the easterly approach extends from the easterly limit of the station area at about Huron Road to about East 37th Street.

The officers of Terminals are:

C. L. Bradley, President
W. S. Hayden, Vice President
George D. McGwinn, Vice President
Charles W. Stage, Vice President and Secretary
J. J. Anzalone, Treasurer and Assistant Secretary
R. G. Murdock, Assistant Treasurer
John Connell, Assistant Secretary.

The Directors of Terminals are:

J. J. Bernet
C. L. Bradley
O. P. Van Sweringen
R. E. Dougherty
W. S. Hayden
W. N. King
C. S. Millard
W. L. Ross
R. D. Starbuck.

Mr. J. J. Bernet is likewise President of Erie; Mr. W. L. Ross is likewise President of Nickel Plate; Mr. R. E. Dougherty is Engineering Assistant to the President of Central; Mr. W. N. King is General Attorney of Central, having headquarters in Cleveland. Mr. C. S. Millard is General Manager of Big Four; Mr. R. D. Starbuck is Vice President of Central. Mr. O. P. Van Sweringen has various railroad connections and I am unable to say definitely what they are but my general understanding is that he is identified with the Chesapeake & Ohio, the Nickel Plate, the Erie and the Hocking, but whether as director or officer thereof I am not able to state. He is a Director of the Cleveland Traction Terminals Company but not an officer thereof. I am not an officer or director of the Cleveland Terminals Building Company. I am Secretary of the Vaness Company.

Adjournment.

May 13, 1929.

Hearing resumed, same appearances as before, with the exception that the Cleveland Union Terminals Company was granted leave to intervene and to file its intervening petition. By agreement of all parties the Cleveland Union Terminals Company proceeded to offer its proof. The following exhibits marked as hereinafter indicated were identified, offered by Mr. W. H. Boyd, counsel for Terminals, intervener, and received in evidence:

"Intervener's Exhibit No. 68, Boyd, Counsel," being the articles of incorporation of the Cleveland Union Terminals Company.

"Intervener's Exhibit No. 69, Boyd, Counsel," being "The Union Passenger Terminal Agreement," between Terminals and the so-called proprietary railroads.

"Intervener's Exhibit No. 70, Boyd, Counsel," being a stipulation dated April 21, 1921, made by and entered

of record by Wheeling in the proceedings in Finance Docket No. 1237.

"Intervener's Exhibit No. 71, Boyd, Counsel," being a stipulation dated January 26, 1922, supplementary to Exhibit No. 70.

"Intervener's Exhibit No. 72, Boyd, Counsel," being ordinance No. 80677 of the City of Cleveland.

"Intervener's Exhibit No. 73, Boyd, Counsel," being acceptance by Terminals of Ordinance No. 80677.

"Intervener's Exhibit No. 74, Boyd, Counsel," being the plans which accompanied Exhibit No. 72.

"Intervener's Exhibit No. 75, Boyd, Counsel," being a supplemental order of the Public Utilities Commission of Ohio regarding clearance under the Eagle Avenue ramp.

"Intervener's Exhibit No. 76, Boyd, Counsel," being a contract between The Cleveland Union Terminals Company and The Wheeling & Lake Erie Railway Company providing for the clearance between Wheeling's tracks and the Eagle Avenue bridge.

"Intervener's Exhibit No. 77, Boyd, Counsel," being the contract supplementary to Exhibit No. 76 between the same parties on the same subject matter.

In offering Exhibit 72 and in the course of a discussion upon an objection thereto by Mr. Hoppe, Mr. Boyd said:

> "Counsel's suggestions entirely overlook the fact that the Cleveland Union Terminals Company is building, and will when ready to go into operation, be operating in interstate commerce. The Wheeling & Lake Erie is likewise operating in interstate commerce. It is because of this fact and this alone that this proceeding is before this Commission.
>
> ["For the purpose of protecting and regulating interstate commerce the Wheeling & Lake Erie and the Cleveland Union Terminals Company are both the wards of this Commission and it is their guardians. In the eyes of the law and in the eyes of the Commission neither has preference over the other. We will show that every step taken by the Cleveland Union Terminals Company up to the present time has been taken with the knowledge of and under the orders of this Commission. Now, whether that was right or wrong begs the question. It is a condition that confronts these two companies and that confronts the Commission. The Commission, I think, would want to know, and I

am certain should know the conditions that confront these two companies which are its wards and the conditions which confront it when it must eventually determine the question of public convenience and necessity.

"Now, under those circumstances the Cleveland Union Terminals Company stands today in a position where it is ordered by the Commission to make use of the Wheeling & Lake Erie Company's property at elevation 52. The City of Cleveland ordered the erection of a bridge and it is built and it is in operation and it is a public highway now. That public highway may continue and the Cleveland Union Terminals Company may still strictly carry out the order of this Commission by building across the Wheeling & Lake Erie's property at elevation 52, but it cannot do that if the Wheeling & Lake Erie is permitted to continue to operate that property as a passenger depot because if it is, then the Union Terminals Company has to go down some 7, or 8 or 9 feet deeper and by so doing will involve itself in a delay of at least two years, in a loss of at least $10,000,000, and then when it gets through the Cleveland Union Terminals Company, instead of being what it is planned to be, and wh t this Commission ordered it to be, namely, the most serviceable and complete union depot in this country, will be a horrible monstrosity."]

HENRY D. JOUETT, a witness previously sworn and examined, was recalled and testified in behalf of Terminals, intervener, as follows:

DIRECT EXAMINATION by Mr. Boyd.

I am Chief Engineer of Terminals, my qualifications and experience as an engineer having been heretofore covered by me in my former testimony. I am in active charge from an engineering and constructing standpoint of Terminals' union depot development with the approaches thereto in Cleveland. The construction of the entire project at this date (May 13, 1929) is from 75 per cent to 80 per cent completed; the work in the station area lying immediately to the west of Wheeling's property is advanced to that extent. The work to the east of Wheeling's property is advanced, say 70 per cent. In other words, we have worked up to this time on all sides of Wheeling's property.

The work is now in active progress and has been since 1922. Practically all construction is under contract at this time and the work under contracts is proceeding. The program under which we are working has been in effect for the last 21 months and if proceeded with according to our prevailing schedule, the union depot will be completed and put in operation by January, 1930.

I have a plan here of the station track level and the part of the east approach track level adjacent to Wheeling's property. No. 1 is the station area track level; No. 2 is the portion of the east approach from the station area to about Broadway; and No. 3 is the plan showing profiles and cross-sections of the tracks as they are proposed by the contracts of December 8, 1921, of the railroads with Terminals, and profiles and sections of the tracks as they would have to be if the tracks were lowered to pass under the Wheeling tracks across the Wheeling property. The maps Nos. 1, 2 and 3 were marked respectively as "Intervener's Exhibits Nos. 78, 79 and 80, Witness Jouett," and received in evidence.

I have a model showing the conditions existing on and adjacent to Wheeling's property prior to the time that Terminals did any work in that vicinity and have another model showing the conditions on and adjacent to Wheeling's property if the work is carried forward in accordance with Terminals' present plan for crossing Wheeling's property at Elevation 52.

The station area extends from a short distance east of Huron Road westerly to Columbus Road. The easterly approach extends from a point a short distance east of Huron Road to the easterly terminal limit at about East 40th Street. The westerly approach extends from Columbus Road to the westerly terminal limit at about West 37th Street. Wheeling's property is included within the so-called station area and the east approach. Wheeling's westerly limit along the Ontario Street line, southerly side, is about 35 feet westerly of the center line of Huron Road produced. The easterly limit that we are considering is the westerly line of Eagle Avenue. The line between the terminal area proper and the east approach is an arbitrary thing. As far as the contracts are concerned, there is a point for the easterly approach and the station area. As far as our common talk about the construction is concerned, it is an arbitrary thing and is substantially the center line of Huron Road produced to the south. According to the plans we have been working under up to the present time the elevation of the track layout in the station proper and of the

west end of the east approach is Elevation 52, City of Cleveland datum, top of rail.

[Exhibit No. 78 shows the initial track layout in the station area and on a portion of the easterly approach as far east as Central Avenue. Exhibit No. 79 shows the track layout from a point just west of Eagle Avenue to a point about 1,000 feet east of Broadway, so that Exhibit No. 78 covers the proposed track layout through and across Wheeling's property, permission for which is sought in this proceeding. Only a slight amount of the trackage shown in Exhibit No. 79 is within the limits of Wheeling's property. The track layout from the easterly to the westerly limit of Wheeling's land is at Elevation 52.]

I prepared the plans attached to the contracts between the proprietary railroads, so-called, and Terminals, which were before this Commission in the year 1921 up to and including the 6th day of December, 1921, when the order of the Commission was made, and the present proposed track elevation is the same as the track elevation shown on and contained in the plans which were attached to and made a part of the original 1921 contract referred to, both as respects Wheeling's property and the entire station area.

The tracks as per the contract and construction plans call for a level profile through the station area and across the property of Wheeling except for one track across the Wheeling property which descends from the east to the west, passing under certain of the other tracks in order to avoid a grade crossing of tracks. The construction contemplates 24 tracks in the station area proper for the use of steam railroads. Terminals has almost completed the viaduct across the Cuyahoga River and Valley, and it should be ready for tracks about June 1st. This is the initial portion of what is called the west approach. Ultimately there will be 5 tracks from the easterly end of the station area, that is, a short distance east of Huron Road at about midway between Central Avenue and Broadway, and then 4 tracks from that point to the easterly terminal limit for steam railroads. All of the 24 ultimate tracks in the station area proper are designed for the movement of through trains as distinguished from standing mail cars, standing express cars and standing Pullmans, waiting to be switched and put in proper use and service. The station track level is 20½ feet below the waiting room concourse level of the station, and the public will go from the platform level, which is slightly above the track level, to the

concourse level by stairs, the climb being 20 feet, one flight to a platform and then to another, making two intermediate landings.

Assuming that Terminals is permitted to proceed and complete its track layout through the terminal area and over the west end of the east approach through the length of Wheeling's property at Elevation 52, the present grade, in view of the height or depth between such elevation and the Eagle Avenue Bridge, it would be impossible to build and operate the union depot at elevation 52 while at the same time Wheeling maintained and operated its passenger station on its property at level 72. The only alternative would be to lower the terminal tracks across the property of Wheeling. It would be necessary to lower Terminals' tracks from zero to a maximum of 20½ feet, and that would mean that the tracks throughout the station area and the platforms would be on a grade of from .56 of one per cent to worse than that in some cases; instead of being level as proposed by our plans. That would be the best grade that could be obtained from the east to the west end of the station area if the tracks across Wheeling's property had to be lowered. The platforms would have to follow the grade of the tracks. Eight feet would be added to the distance that the traveling public would go to the trains from the concourse and ramps and waiting rooms and going from the trains to the various outlets. That would require about fourteen additional stair steps or risers. This would not be in conformity with good railroad operation, judging from my experience, and, in my knowledge of the railroad depots of this country I do not know of any such elevation as that between the platform level and the waiting rooms or concourse levels.

Elements of inconvenience and danger result if the grade in the track level of a passenger station is as much as .56 of one per cent. We never put platforms and tracks adjacent to platforms on a grade in excess of .35 of one per cent, and the nearer we can approach zero, the better. When you get a grade above .35 of one per cent, the cars will begin to roll with very little pressure, and it is a dangerous condition for standing cars. The same thing would hold true on your platforms as regards the standing of baggage trucks. Always when a grade, such as I have testified to exists, the possibility of trucks beginning to roll and causing damage to people on the platforms or rolling off the platforms on to the tracks, and possibly causing derailment must be considered. Again, the lowering of our grade to pass under any station that Wheeling might con-

struct results in a grade of .72 of one per cent to the east of the platforms down to the low point as you go east under Wheeling and a similar grade as you continue east to get back up to level 52. This will interfere with the switching of cars in the station, and the easterly end of the station is the point at which the majority of switching will be done. Train operation and switching would be slowed up and thereby the capacity of the station would be cut down. From my experience as a station engineer and my general knowledge of the operation of railroad passenger depots, I do not know of any other alternative except the one which I have mentioned, provided the application of Wheeling to abandon its site as a passenger depot is not granted. If Terminals is compelled to resort to that alternative, before thus lowering its track levels, all of the structures, buildings and bridges which we have either completed or have under way, in the station area and on the east approach to Broadway would have to be underpinned; in many cases the foundations now existing being entirely removed, the columns lowered down and new foundations installed; in other cases the foundations being simply underpinned with concrete. That process of underpinning any structure is exceedingly slow, and, in my opinion, it would take at least two years to underpin the structures in question, thereby delaying completion of the terminal for that period. Furthermore, there would be an expenditure of at least ten millions of dollars to carry through that underpinning work, and this without reference to the loss of interest and carrying charges on the investment already made. Terminals has already spent in the acquisition of land for and the work done upon the construction of the union depot development with its approaches both east and west about sixty-one million dollars, and the monthly interest charges on the sum so expended are now running about two hundred fifty thousand dollars. In view of the contracts already let and the work that yet has to be done about twenty-seven million dollars will be required to complete the entire improvement. The two years additional time to which I referred would be two years from the time of the decision of this Commission.

The bridge across the Cuyahoga Valley, which is practically completed, is built on a series of concrete piers and any proposition involving the necessity of lowering the terminal area proper could not affect the elevation of the tracks across the Cuyahoga Valley. We have studied the possibility of lowering the tracks in the station under Wheeling, on the basis that the grade of the Cuyahoga

viaduct must remain fixed. The viaduct is about 3,400 or 3,500 feet long. If we were required to go down to the new level below Elevation 52, the grade on the east approach would be .72 of one per cent beginning at approximately Eagle Avenue and extending easterly to approximately Broadway, a distance of about 2,000 feet.

[Testifying now with reference to the track layout and other structures in connection with the terminal, Wheeling's property in question extends from Eagle Avenue to Huron Road. The tracks of Wheeling were on a grade from Eagle Avenue to Huron Road, rather sharp from Eagle Avenue to the easterly end of the station platform, and then nearly level through the station platform by the station building. To the south of Wheeling's property there existed Canal Street and Canal Road, with an embankment between the two levels, Canal Street being from 15 to 20 feet below the grade of Wheeling's tracks. Canal Street was connected with Ontario Street, which lies to the north of Wheeling's property, by a roadway commonly called Vinegar Hill, that roadway having quite a steep grade. Wheeling's tracks at the station were about 25 feet below the level of Ontario Street. Wheeling's station was on the southerly side of Ontario Street, with an entrance from Ontario Street. To the east of Wheeling's property, as far as Eagle Avenue, there were a series of buildings along the Ontario Street frontage, varying in height, being of a greater depth or greater height on the back side than on the street side, on account of the contour of the ground, that is, Wheeling's property lying some 25 feet or more below the level of Ontario Street. Wheeling's tracks crossed Eagle Avenue on a bridge above the street. Along the southerly side of Wheeling's tracks and opposite its station, there was a series of coal pockets with an industrial siding to the south of Wheeling's main track, serving those coal pockets. Those pockets were abandoned several years ago, and Wheeling then did some filling in of the old coal pockets. This was prior to the time that Terminals did any work in the vicinity of Wheeling's property. Wheeling had one main track leading to the station, the industrial siding on the south which I have just mentioned, a siding to the north leading back into the building of Swift & Company just east of Wheeling's station, a siding leading west from a point about midway between Wheeling's station and Eagle Avenue leading into the building of Morris & Company, and a siding extending from the track westerly to the Bishop-Babcock-Hurd Building right on the southerly side of Vinegar Hill and westerly of Huron Road.]

During the past two years a viaduct has been built in Eagle Avenue over Wheeling's tracks and Canal Street from Ontario Street to the so-called flats, which is the low-lying portion of the city at Scranton Road crossing over the Cuyahoga River. Wheeling's track was lowered at Eagle Avenue about four feet to permit that construction. The terminal construction west of Wheeling's property has been carried on with the top of the rail at elevation 52 approximately 40 feet below the level of Ontario Street. The terminal station, the viaducts, Prospect Avenue and Huron Road were constructed over the terminal station, in accordance with the city ordinance, and supported on concrete foundations below elevation 52, with steel columns on these foundations. The tracks leading into the station from the east are carried under Ontario Street to a depth of approximately 40 feet, and to carry through the complete plan it is necessary to go across Wheeling's property at elevation 52, constructing a retaining wall along the northerly side and on part of the area a roof over the tracks to carry Ontario Street, which is to be widened 16½ feet, on Wheeling's property, and to carry Huron Road viaduct which leads out of Ontario Street to the west. Canal Road will be relocated to the south from the building of the Cleveland Electric Illuminating Company, approximately opposite Wheeling's station, for a distance of 2,000 to 2,500 feet, and the terminal tracks will be carried across the angle in Canal Road and Canal Street at the northwesterly corner of the Illuminating Company building by a steel bridging. Walls will be constructed along the northerly side of Canal Road and Canal Street, adjacent to Wheeling's property, and walls will be constructed to the north of Wheeling's tracks adjacent to Ontario Street. As a matter of fact, the wall north of Wheeling's tracks, east of Wheeling's property, is now completed. The wall along Canal Road, which is the portion of the street westerly of the Illuminating Company plant, is completed. The wall along Canal Street easterly of the angle is at least 60 per cent completed.

CROSS EXAMINATION by Mr. Hoppe.

The level of Ontario Street is city datum 91 and the level of the present Wheeling tracks is city datum 65. In order to build across Wheeling's property the tracks to be used by the traction companies as well as the tracks to be used by the steam railroad companies, we will have to excavate the whole property a depth of around 15 or 16 feet.

[In the station area proper there ultimately will be 10 tracks for traction purposes. The 6 northerly tracks shown on that exhibit are for traction purposes but there will ultimately be 4 more to the north of the 6 shown. The 6 tracks south of the words "Terminal Tower" are the traction company's tracks that are going to be built at this time, and north of those 6 tracks and of the words "Tower Building" are to be built 4 more traction tracks, which will extend toward Ontario Street and hook up with the tracks that are there shown. Ultimately there will be 5 tracks for steam railroad purposes just west of the station for about 1,500 feet and then 4 for the balance of the distance to the west terminal limits. There will be 4 tracks for traction purposes the entire length of the westerly approach, so that there will be 4 for steam purposes and 4 for traction purposes the entire length of the westerly approach. There will be 5 for steam purposes for a certain distance outside of the station area.

In order to lower the tracks through Wheeling's property, all of the improvements that have already been made and which are outlined in pink on Exhibit No. 78 must be either underpinned or torn down and put up anew. The area colored in pink or red on Exhibit No. 79 out around Central Avenue indicates the bridge carrying Central Avenue and the Central viaduct over the terminal tracks, and this likewise would have to be underpinned in order to lower Terminals' tracks through Wheeling's property.]

The purpose of the so-called easterly approach is to make a connection with the Nickel Plate right of way at about East 40th Street. Over the Nickel Plate right of way will come the trains of Central and Nickel Plate into the terminal. The westerly approach connects with the Big Four right of way at about West 30th Street and with the Nickel Plate right of way at about West 37th Street, and the Nickel Plate, Big Four and New York Central trains will connect with the terminal at those points. The Terminal Company will send out its electric locomotives to take up the trains using the union depot. If they are coming in from the west they will send those electric locomotives out to West 37th Street and hook onto the trains and bring them into the station; if they are coming from the east they will go out to East 40th Street, hook onto the trains and bring them into the station; they may go farther. In taking trains out of the station, the Terminals' electric locomotives will take the trains at least as far as the points indicated, if not farther. In the case of the

Central they will probably go as far as Collinwood on the east, which is about ten miles from the Public Square. In the case of Big Four and Central on the west they will probably go as far as Linndale, which is six or seven miles from the Public Square. In the case of Nickel Plate they will go somewhere around East 40th Street on the east and West 37th Street on the west.

If we had to lower our tracks through Wheeling's property so as to permit Wheeling to use its own property for station purposes, it would result in a grade of .56 of one per cent in the station area proper and then outside of the station area as shown by Exhibit No. 40, after coming down a grade of .56 per cent the tracks would dip into a grade of .72 per cent to a point underneath Eagle Avenue, at which point they would start up a grade of .72 per cent substantially to Broadway, where they would hook on to the east approach at city datum 60. Physically there is nothing to prevent us from lowering the east approach beyond Broadway and by lowering the east approach beyond Broadway we would lessen the grade from Eagle Avenue up to the east approach. The farther east we carry the point of connection, the flatter the grade would be between Eagle Avenue and that point. It is physically possible to lower the west approach but you get into other difficulties; the main one is the crossing over the Cuyahoga River. The present clearance over the Cuyahoga River of our west approach is 93 feet above the water, government requirement. A one per cent grade means 52.8 feet per mile, or one foot to the hundred, and grades of .56 per cent and .72 per cent mean respectively .56 feet and .27 feet per hundred.

RE-DIRECT EXAMINATION by Mr. Boyd.

[If we could or should lower the grade farther east on the east approach, in getting down to the lower level as we pass Wheeling's property, that would not help the grade through the terminal area. In other words, the grade over the Cuyahoga Valley must remain as it is for the reasons stated. The farther east we go in lowering the grade the greater the additional cost as we would get into the underpinning or construction of additional structures such as the Broadway Bridge east of Broadway, built by the Nickel Plate over the Terminals tracks, and two walls built by the Nickel Plate east of Broadway between its tracks and the terminal tracks. We would get into the construction of retaining walls where we now have slopes. All of these works are of recent construction and

conform to the plans as outlined and adopted.] Up to the time that the Eagle Avenue viaduct matter was settled it would have been possible to have raised the Wheeling's tracks so as to pass above Terminals' tracks at Elevation 52, but the reverse is now true.

RE-CROSS EXAMINATION by Mr. Hoppe.

From 1921 up until the time that the Eagle Avenue bridge question came up, so far as I know, there were no arrangements to use the Wheeling's property at city datum 52.

W. F. SCHAFF, called as a witness on behalf of the intervener, The Cleveland Union Terminals Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I reside in Cleveland and have been Assistant General Manager of the New York Central west of Buffalo for the past three years. Prior thereto I was in the transportation department of the same company or its family lines for a period of thirty-four years, starting as a clerk in the railroad yards, operating a switching locomotive as conductor of that locomotive and crew, assistant yardmaster, yardmaster, general yardmaster, trainmaster, assistant superintendent, superintendent and general superintendent. The entire thirty-four years experience has been on different divisions of the Central. As General Manager I have general charge of train operations and as superintendent prior to that time practically my entire time was taken up with train operations and movements. In all my experience I have been connected with transportation work, coupled with it the supervision of terminal train service including switching service, and I am familiar with a good many of the track grades in various depots throughout the country, such as the Grand Central Terminal in New York, Albany, Buffalo, Cleveland, Toledo, Detroit, Columbus, Indianapolis, Cincinnati, Louisville, the four terminals in Chicago, St. Louis, Kansas City, Memphis and New Orleans. I am chairman of the advisory committee of Terminals and have been for a year and three months. Questions are referred to that committee in regard to track construction and building facilities principally. During the past year and a half I have kept track of the progress of the work and development there and the plans for the same. I am familiar with the general station layout, particularly that part of

it which shows the track elevation and the grade layout of the station and its approaches, and I am familiar with the exhibits in evidence here, particularly Nos. 78, 79 and 80.

I am aware that the plans as prepared and the work as proposed provides for a level grade of tracks through the station proper and I am familiar with the plans which show a grade of .56 per cent through the station, which would presumably have to be maintained if Wheeling's property cannot be used at elevation 52.

I think the usefulness of the station will be impaired to about 25 per cent as the minimum, if the station is operated at such a grade. In a transportation way, it means that trains standing in the station would be on a .56 per cent grade. It would also mean in placing cars in this station for occupancy, particularly sleepers to accommodate people at night, they would have to stand in the station on that grade. It would also mean all switching would have to be done on a grade, whether it is with steam or electric power, and that would mean that in the switching of these trains the locomotive would have to make the approach to the station under force, a great deal more force than it would if the tracks were level, and it would be more difficult for the engineer to control the speed and approach to the remainder of the train standing in the station in doing that switching. That would bring about a normal hazard in that the yard crews and engine crews could not handle those trains with the same measure of dispatch that they would if the tracks were level.

In addition to that your platform would have to conform to your track level. All mail, baggage and express trucks would have to be controlled in some manner standing on that platform. If you did not do that the trucks would be liable to roll off or down the platform, possibly onto the tracks and in the way of other trains.

Another feature that enters into this quite vitally is the question of accommodation for invalid and injured persons who come in or go out of Cleveland, who must be handled in arm chairs and other facilities of that kind. It would be quite difficult to take care of them on a grade platform and a grade track as compared with a level platform and level tracks in the station.

There is the element of interference in this: it would take longer to do the switching on a grade, which will slow up the work to the extent that it will add to impairing the usefulness of the general facility. In other words, you will not be able to get your trains in and out of the station as rapidly if you put this plan into effect as you would if the station was on a level.

It will be necessary to park from a minimum of 34 to a maximum of 53 sleepers every night between 8:30 and 9:15 for the accommodation of outgoing passengers on various trains leaving Cleveland. Those cars will have to stand in the station anywhere from a minimum of one hour to a maximum of four hours and a half, depending upon the destination of the car and the train in which it moves. There will also be certain mail cars, RPO cars, first class mail that will be standing in the station.

Now, right adjacent to the station is a system of tracks which will be on the same elevation that will accommodate approximately 178 cars. That will be known as the coach yard facility adjacent to the main station until such time as we have to use it for other purposes. That yard will be there and occupied practically all the time. It may not be full during every moment of the 24 hours, but it will be in general use and largely occupied by cars coming in and going out of Cleveland and leaving at a later hour. As compared with level tracks, in a station containing level tracks, we simply cut these cars off when they stop and permit them to stand there. If you had a grade of .56 of one per cent in this station or in the coach yard, it will be necessary to use the handbrakes on all of those cars to control them. You cannot depend upon the air, because the air will gradually leak off. Now, in using hand brakes on any equipment, whether it is passenger or freight, there is a hazard in connection with that, in that if you couple on to those cars at one end you are liable to jar the brake off and the cars start and away they go down the grade. It is anything but a good thing to have a station layout on a grade. Practically every train that comes into this station will have a certain amount of switching to do on it.

These elements of inconvenience or hazard will make the operating costs more or less expensive because it will take longer to do the work and we will have to put on more men to take care of the work. On the assumption that none except the three proprietary roads, namely, the Big Four, Central and Nickel Plate steam railroads make use of the station, this means 115 trains per 24 hours and from 5 to 16 cars, or an average of approximately 10 cars per train.

I do not know of any station facility in any city, including the stations to which I have referred with which I am familiar, where the tracks are on a grade. If the tracks were lowered below city datum 52, the additional distance from the track level to the level of the waiting room will be approximately eight or nine feet and the distance would be greater than any depot I know of. It

would take a considerably longer time to get to and from the trains and the traveling public would have the additional steps to climb or come down, as the case might be.

In the operation of this depot, no matter at what level, it will be necessary from time to time to have more than one train standing on one track within the station area, and as nearly as we can chart the service approximately 12 per cent of the service will arrive and depart upon two tracks or two trains on one track. With the grade of .56 per cent there would not be so much danger in connection with the road trains entering the station but there would be considerable danger in connection with the switching which I have referred to on all of these trains because the switch engine with a part of the train would have to go out to practically the low point under Eagle Avenue in many instances to perform the switching service and then start up a .72 per cent grade until it reaches the station area, then on a .56 per cent grade, and in doing that under steam power or electric power it will have to be mighty careful to avoid striking another train standing on that track. A depot of this kind will necessitate a great deal of switching, principally at the east end, back under Eagle Avenue. The switch leads extend all the way to Eagle Avenue and we will have to go out into that area. The elements of inconvenience and danger which I have pointed out are applicable alike to operation by electric power or steam, although the depot and its approaches are to be operated by means of electric motive power.

Cross Examination by Mr. Hoppe.

I was not chairman of the advisory committee when the Eagle Avenue ramp ordinance was passed by the council of the City of Cleveland nor did I advise Terminals to accept the Eagle Avenue ramp ordinance.

The .56 per cent grade would begin practically within 200 feet of the Cuyahoga River abutment alongside the westerly end of the Erie station. The .56 per cent grade would dip into the .72 per cent grade at approximately the easterly end of the station, within two or three hundred feet of the actual station layout, and the distance from the westerly approach where the .56 per cent grade would start to the westerly end of the station where the .56 per cent grade would end and the .72 per cent grade begin would be approximately twenty or twenty-one hundred feet. The .72 per cent grade would then begin where the .56 per cent grade stops and dip from there down to a point directly un-

derneath Eagle Avenue for approximately sixteen hundred feet.

When an engine is cut loose from a Pullman car the air brakes automatically set if the train line is charged with air, but in switching the train line is not always, though usually, charged with air. Once the line is charged with air and it is cut loose, it may stay charged fifteen minutes or an hour, depending entirely on the normal leakage, but I do not know of any case where a car has retained air for ten hours. Approximately forty-five minutes is as long as a train will retain air, that is, a train line, this depending upon the condition the equipment is in.

Central, Big Four and Nickel Plate have 115 trains per day, counting a train coming in or going out as one train, and Central has been increasing its trains right along. My figures were compiled May 9, 1929, from the train sheets of Central and Big Four and telephone information from Nickel Plate. Nickel Plate has 10 trains, Big Four 34 and Central 71. In taking an average of 10 cars per train I assumed that Nickel Plate's average would be the same as Central and Big Four. I do not know how many trains we have added since January 21, 1929, nor the length of time these roads have been operating 115 trains per day. Where a train runs in sections I counted each section as a separate train, and I took the record simply as it was. The figure of 71 trains for Central was taken for May 9, 1929, which I believe was a typical day in Central's operations as would be May 15th or any day in the month of April or May.

By Mr. Boyd: The Cleveland Union Terminals Company, Intervener, rests.

The following exhibits were identified, offered by the Pittsburgh & West Virginia Railway Company, intervener, and received in evidence:

"Exhibit No. 81, Counsel, Hoppe," being a certified copy of the opinion of the Supreme Court of Ohio, dated May 1, 1929, affirming the order of the Public Utilities Commission in re the application of the applicant offered as Exhibit No. 29, for authority to abandon its line of railroad northerly of Eagle Avenue and its Ontario Street Passenger Station, Cleveland, Ohio.

"Exhibit No. 82, Counsel, Hoppe," being a copy of the intervening petition of The Wheeling and Lake Erie Railway Company, filed in April, 1921, in Finance Docket 1237.

"Exhibit No. 83, Counsel, Hoppe," being a certified copy of excerpts of the minutes of various meetings of the Board of Directors and Executive Committee, respectively, of the Wheeling, from November 7, 1920, to date.

"Exhibit No. 84, Counsel, Hoppe," being a resolution offered by Mr. Bicknell and seconded by Mr. Petrequin at the meeting of the Board of Directors of Wheeling held on July 11, 1928, and which does not appear of record in the minutes of the meeting heretofore received as Exhibit 45.

"Exhibit No. 85, Counsel, Hoppe," being a letter from Mr. Taplin to the secretary of Wheeling, protesting the omission of Exhibit No. 84 from the minutes of the Directors' meeting of July 11, 1928.

"Exhibit No. 86, Counsel, Hoppe," being a copy of a letter written by Mr. Taplin to the assistant secretary of Wheeling under date of August 3, 1928, and his reply thereto.

"Exhibit No. 87, Counsel, Hoppe," being a statement of the amount of the capital stock of Wheeling transferred to Central, B. & O. and Nickel Plate, and in each instance to officers of these respective companies in February and April, 1927.

"Exhibit No. 88, Counsel, Hoppe," being a certified copy of the minutes of the annual meeting of stockholders of Wheeling held on May 25, 1927.

"Exhibit No. 89, Counsel, Hoppe," being a statement of the names of those Directors of Wheeling who are now Directors of Wheeling, who were present either in person or by proxy at the annual meeting of the stockholders of Wheeling held on May 25, 1927.

"Exhibit No. 90, Counsel, Hoppe," being a statement as to how the stock of Central, B. & O. and Nickel Plate was voted at the annual meeting of the stockholders of Wheeling held on May 25, 1927.

"Exhibit No. 91, Counsel, Hoppe," being a certified copy of the minutes of the annual meeting of the stockholders of Wheeling held on May 23, 1928.

"Exhibit No. 92, Counsel, Hoppe," being a statement as to how the stock of Central, B. & O. and Nickel Plate was voted at the annual meeting of Wheeling stockholders held on May 23, 1928.

"Exhibit No. 93, Counsel, Hoppe," being a statement of the number of shares of the capital stock of Wheeling which are owned or which stand of record in the names of the present directors of Wheeling.

"Exhibit No. 94, Counsel, Hoppe," being a copy of the complaint which was issued by the Interstate Commerce Commission in Docket No. 21012 against the Baltimore & Ohio Railroad Company under the Clayton Act.

"Exhibit No. 95, Counsel, Hoppe," being a copy of the complaint filed by the Interstate Commerce Commission in Docket No. 21012, Sub-division No. 1, against the New York Central Railroad Company under the Clayton Act.

"Exhibit No. 96, Counsel, Hoppe," being a copy of the complaint filed by the Interstate Commerce Commission in Docket No. 21012, Sub-division No. 2, against the New York, Chicago and St. Louis Railroad Company under the Clayton Act.

"Exhibit No. 97, Counsel, Hoppe," being the order and findings of the Commission entered upon the complaints filed and which have been received in evidence as Exhibits No. 94, 95 and 96.

"Exhibit No. 98, Counsel, Hoppe," being a statement of the persons to whom and the dates upon which the stock which was acquired by Central and B & O was transferred, and as to the status of the stock which was acquired by Nickel Plate.

"Exhibit No. 99, Counsel, Hoppe," being an estimate of the cost of the Cleveland Passenger Terminal as filed with the Interstate Commerce Commission in Finance Docket No. 1237.

"Exhibit No. 100, Counsel, Hoppe," being the contract between Oris P. Van Sweringen and Central, Big Four and Nickel Plate with respect to the stock of Terminals.

"Exhibit No. 101, Counsel, Hoppe," being the Agreement between Terminals and Traction, dated December 8, 1921, but without maps attached.

By Mr. Hoppe:

May the record show that Nickel Plate, Building, Traction, the Vaness Company, and the Alleghany Corporation are companies, stock control of which is vested in O. P. Van Sweringen and M. J. Van Sweringen and/or other corporations of which they have stock control.

That the officers of Traction are: C. L. Bradley, President; M. J. Van Sweringen, Vice President; J. J. Anzalone, Treasurer; Charles W. Stage, Secretary; John P. Murdock, Assistant Treasurer and Assistant Secretary.

That the Directors of Traction are: O. P. Van Sweringen, M. J. Van Sweringen, C. L. Bradley, J. R. Nutt and Charles W. Stage.

That the officers of Building are: C. L. Bradley, President; M. J. Van Sweringen, Vice President; R. H. Sharpe, Vice President; J. J. Anzalone, Treasurer; John P. Murphy, Secretary; D. S. Barrett, Jr., Assistant Treasurer and Assistant Secretary.

That the Directors of Building are: O. P. Van Sweringen, M. J. Van Sweringen, D. S. Barrett, Jr., John P. Murphy, and C. L. Bradley.

That the officers of the Vaness Company are: O. P. Van Sweringen, President; M. J. Van Sweringen, Vice President; J. R. Nutt, Vice President; C. L. Bradley, Treasurer; Charles W. Stage, Secretary; J. J. Anzalone, Assistant Treasurer; D. S. Barrett, Jr., Assistant Treasurer; John P. Murphy, Assistant Secretary.

That the directors of the Vaness Company are: O. P. Van Sweringen, M. J. Van Sweringen, C. L. Bradley, J. R. Nutt and Charles W. Stage.

That the officers of Nickel Plate are: M. J. Van Sweringen, Chairman of the Board; W. L. Ross, President; J. R. Nutt, Vice President; J. W. Graham, Vice President; H. J. Klein, Vice President; H. H. Hampton, Vice President; John Sherwin, Vice President; W. A. Colston, Vice President and General Counsel; A. R. Ayers, General Manager; G. S. Ross, Secretary and Assistant Vice President; L. B. Williams, Treasurer; Louis A. Bell, Comptroller; W. J. Bergen, Engineering Assistant to the President; W. A. Collie, Superintendent of Transportation.

That the Directors of Nickel Plate are: M. J. Van Sweringen, W. L. Ross, W. A. Colston, J. R. Nutt, L. B. Williams, John Sherwin, B. P. Jenks, J. A. House, George S. Ross, A. P. Sloan, Jr., F. Edson White, P. A. Cristal, G. J. Arnold and John P. Murphy.

That C. L. Bradley, prior to February 1, 1929, was a vice president and a director of Nickel Plate, but that since such time he has resigned.

That the officers of the Alleghany Corporation are: O. P. Van Sweringen, President; M. J. Van Sweringen, Vice President; C. L. Bradley, Vice President; John P. Murphy, Secretary; D. S. Barrett, Jr., Treasurer; J. J.

Anzalone, Assistant Treasurer; T. W. Boutall, Assistant Treasurer; P. A. Cristal, Assistant Treasurer; John Connell, Assistant Secretary.

That the directors of the Alleghany Corporation are: O. P. Van Sweringen, M. J. Van Sweringen, J. R. Nutt, C. L. Bradley and D. S. Barrett, Jr.

That Percy Weisenauer, Archibald Elliott, Fintan Timothy, Francis Gibbons, Arthur E. Burke, Frank Rhodes and Chester S. Hawkins, to whom the prior lien, preferred and common stock of Central, Patrick E. Crowley, Albert H. Harris, Warren S. Hayden and B. & O., Newton D. Baker, George M. Shriver and Daniel Willard was transferred on March 12, 1929, as shown by Exhibit No. 98, hold the same for the Alleghany Corporation.

By the Examiner: The record may so show.

CHARLES O. DAMBACH, called as a witness in behalf of the protestant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Hoppe.

I reside at Pittsburgh and have been Superintendent of the Pittsburgh & West Virginia Railway for the past ten years. I have been engaged in railroad work for about thirty-five years as telegraph operator, station agent, yardmaster, dispatcher, chief dispatcher, superintendent of telegraph, chief clerk to executives, train master and superintendent. My experience as outlined, particularly within the last ten years, has required me at various times to make cost analyses.

I have examined the plans of Terminals' project accompanying Exhibit No. 49 and have further examined the applicant's exhibits Nos. 33, 34 and 35. I also examined the agreement btween Terminals and the proprietary lines, so-called, offered in evidence as Exhibit No. 69, and the agreement between Terminals and Traction, Exhibit No. 101. I have examined the location of the union terminal at Cleveland and walked over all of the station proper. I have been advised that Mr. Durham, Vice President and General Manager of Wheeling, has testified heretofore that Central had a total of 34 trains, Big Four 14 trains and Nickel Plate 7 trains running in and out of Cleveland, and I have made some investigations of my own to determine the number of cars that there would be per train for these roads. I ascertained what the average would be, based on their average as a system from their annual reports. With

that information at hand I have made a calculation as to the amount which it would cost Wheeling per car or per train to use the facilities of Terminals if Wheeling were compelled to pay the same amount per train or per car as any one of these three railroad companies using the depot.

The figures on the document which is marked for identification as Exhibit No. 102 are the result of my compilation, but a correction should be made in the last printed matter appearing on the exhibit, which reads: "Wheeling & Lake Erie percentage of Total, Based on Cars Handled, Less Deduction of 50 per cent covering all Operating Expense Items except Station Service," by making the same read, "Except General Expense and Station Service." I deducted 50 per cent of all operating expense items because Wheeling will not occupy as much electrified mileage as the other roads. Fifty per cent, of course, is pretty liberal but I wanted to lean the right way. In making my calculation of percentage of the total I figured the fair percentage for Wheeling to pay would be 7.41% less the 50 per cent for certain items. I deducted the 50 per cent from the total after I took the 7.41 per cent of the total.

The statement above mentioned was offered and received in evidence and marked "Exhibit No. 102, Witness Dambach."

I have not had an opportunity since Mr. Schaff was on the stand to figure out in just what way his testimony, to the effect that there is a total of 115 trains and an average of ten cars per train per day on these three railroads in and out of the station, would affect this Exhibit No. 102, and it would require a couple of days to remodel this exhibit based on Mr. Schaff's figures. I will, however, prepare such exhibit. (See Exhibit 155.)

Cross Examination by Mr. Martin.

I was a telegraph operator, station agent, chief clerk to the record office, weigh-master and chief clerk to the trainmaster, all with the Bessemer & Lake Erie. I was with the Standard Steel Car Works for a short length of time as assistant general yardmaster and then went to the West Side Belt Railroad as chief clerk to the superintendent. The Belt was then an independent road about 25 miles in length and had frequent local passenger service but no sleeper or Pullman service. The Belt was taken over by the Wabash-Pittsburgh Terminal, or they were both a part of the Wabash System at that time prior to receivership, and I was chief dispatcher in charge of the trainmen station

forces, and then was made chief clerk to the general superintendent of the Wheeling and the Wabash-Pittsburgh Terminal and the West Side Belt. Among my duties was chief clerk of the Wabash Line east of Toledo, so known at that time, and I was also made superintendent of telegraph. After leaving these positions I went out on the road and took a position as train-master on the Wheeling, the Wabash Terminal and the Belt. After the receivership I was made train-master in charge of transportation and my title afterwards was changed to superintendent. My position with Wheeling was on the east end of the road some one hundred miles or more from Cleveland, where the principal traffic is coal and a good deal of steel. The Pittsburgh & West Virginia does not handle any through passenger business now and has not for a number of years, but did at that time, and its present local passenger business is not very large. I have had considerable experience in connection with costs, some of which was acquired from your former vice president, Mr. Worthington. I have not made a detailed study of costs covering a union passenger station heretofore nor of any passenger station covering the handling of a large number of through passenger trains. I have heretofore made a detailed study of the cost of operating our Pittsburgh Terminal, which does not now handle through passenger trains nor has it handled them for the past twenty-one years.

In making this study (Exhibit No. 102) I proceeded on the assumption that the number of trains going through the station based on the figures furnished from the testimony of Mr. Durham was irrespective of the number of sections, but I made no independent investigation to verify it. I got the the number of cars from the annual report of the carriers involved. Exhibit No. 102 is made upon the assumption that Wheeling would bear its proportional share of all expenses but subject to a 50 per cent deduction which I have shown at the bottom of the statement. I did not make any effort to determine what the out-of-pocket cost of handling Wheeling's trains would be, and the study I made in connection with the report indicated that it was the ordinary practice for each carrier to stand its proportion or some agreed percentage. I was not interested in this study in determining the out-of-pocket cost.

Adjournment.

May 14, 1929.

I was not asked by my principals to make an estimate of the out-of-pocket costs involved in furnishing Wheeling the service which Terminals had agreed to render for $20,000. I was asked by Mr. Hoppe to estimate as nearly as possible the cost of operating and maintaining the union depot, including taxes and interest on borrowed money, but without including the sinking fund requirements necessary to meet payments of principal and without including dividends on the capital stock of Terminals, and to estimate the amount of the total cost so figured, which the Wheeling would have to pay if required to pay the same amount per train or per car as the Central, Big Four and Nickel Plate, making proper allowances for differences in service. I was not asked to estimate the out-of-pocket cost and do not believe that any reasonable or fair estimate could be made thereof because Terminals is not yet in operation. However, the contract calls for 3,000 trains and for 14,000 cars to be handled for $20,000 per annum, which is the equivalent of $6.66⅔ per train or $1.43 per car. Considering that the locomotives of Terminals will have to make four trips to get each car or train, and that the same will consume about one hour's time, on the average, the cost of labor alone involved is about $5.35 for the train crew and engine crew. This does not include power consumed, wear and tear on locomotives, wear and tear on rails or cost of any other service.

In 1928 I was Superintendent of the Pittsburgh and West Virginia. I was General Superintendent of the Pittsburgh & West Virginia a part of 1923 and in 1924, 1925, 1926, 1927 and a part of 1928. In 1922 I was Vice President and General Manager of the Unity Railways, and was with Unity Railways about six years, from 1922 back to 1916 or 1917. This is a coal road about five miles long running into the Bessemer & Lake Erie at Unity Yard, at North Bessemer. It goes into the coal fields and has one passenger train which does not go through any large terminal except into North Bessemer, which, however, is a freight and not a passenger terminal. The road operated one passenger train each way per day in local service. It was a steam operated line. Prior to 1917 I was Superintendent of the Pittsburgh & West Virginia or its predecessor back to about 1912, and for the four years prior to that I was train master and just prior to that I was chief clerk and superintendent of telegraph of the Wheeling, that is to say, the Wabash Lines east of Toledo. The roads I

have been with are all steam operated and I have had no experience with electric operation. The Pittsburgh & West Virginia Railway is about ninety miles long including the old West Side Belt.

I have never before made a cost analysis of the operation of a large passenger station prior to this analysis which has been submitted as Exhibit No. 102. I have myself made analyses of the operation of the Pittsburgh & West Virginia terminal station at Pittsburgh. The accounting officers analyzed the reports and I made my own analysis. Our station there is a stubend, steam operated station, having at present three trains each way, all local service operating from Pittsburgh westerly to Pittsburgh Junction, Avella and Mingo.

The officers of The Pittsburgh & West Virginia Railway Company as shown by the last annual report are: Frank E. Taplin, Chairman of the Board and President; H. W. Nethken, Vice President in Charge of Traffic; J. R. Kraus, Vice President; C. F. Taplin, Vice President and General Counsel; F. C. Baird, General Manager; John S. Wendt, General Attorney; W. S. Bronson, General Attorney; F. H. Harvey, Secretary and General Auditor; H. C. Moore, Treasurer; V. A. Wholey, General Traffic Manager; R. M. Paisley, General Freight and Passenger Agent; H. J. Yute, Real Estate and Freight Claim Agent; C. O. Dambach, Superintendent.

In making Exhibit No. 102 I consulted with Mr. C. F. Taplin and our General Manager, Mr. Baird. Exhibit No. 49, which I examined, being the contract between Terminals and Building, did not have a whole lot to do with this study but was accompanied, as I remember it, by a number of maps and it was the maps that I was particularly interested in. Exhibit No. 33, being the profiles of the tracks to be operated temporarily by Wheeling to reach Erie's Superior Avenue Station, had nothing to do with this track study. I did not use Exhibit No. 34 in this study. I exam ined Exhibit No. 35, which is a map of the terminal layout, and also Exhibit No. 69.

In Exhibit No. 102 I included an item of $1,290,300 for taxes, which were figured at $2.53 per hundred dollars on 60 per cent of $85,000,000, and I included an item of $4,250,000, which is for interest figured at 5 per cent on $85,000,000. I understood the entire cost of the terminal, with approaches, would be about $88,000,000 when completed but I took $85,000,000. This includes the terminal to the limits at West 37th Street and East 40th Street as

shown on Exhibit No. 69. I apportioned these taxes and interest on investment, which aggregate $5,540,300, as between Wheeling and the proprietary lines on a per car basis, treating them all on the same basis.

It is approximately 9,000 feet from the westerly limit of the terminal area at West 37th Street to the easterly limit of the west approach at Columbus Road, this distance including the crossing of the Cuyahoga River on a number of piers with the tracks carried 93 feet above water level. I do not know the length of that track on the piers over the river but have known approximately the length of the track from West 37th Street to the entrance of the terminal. Wheeling operates a short distance from its connection into the terminals station on the easterly end. It does not operate over the westerly end unless it is to do some switching in connection with placing cars such as baggage, express or mail cars. As a general proposition, Wheeling is not going to operate west of the station but if it had a business car or special train having to go west of the station it would, I suppose, as an isolated special movement not on its schedule. All of its schedules, however, call for a moment eastward from Cleveland. I understand Terminals will have four steam tracks on the westerly approach to the station from West 37th Street to Columbus Road and then five into the station and also four traction tracks. Coming into the station proper I did not assume that Wheeling would use any part of the station coach yard except in remote cases for emergency. The coach yard in the terminal as appears from Exhibit No. 35 will have ten tracks with lengths as follows: 1,484 feet; 1,489; 1,706; 1,932; 1,624; 2,025; 2,125; 2,149; 1,735 and 1,521, aggregating somewhere between 15,000 and 20,000 feet.

I understand there are going to be ten tracks in the traction portion reserved entirely for traction trains or cars, none of which Wheeling would use. About half of the station area is included in the so-called westerly portion from the center of the station out to Columbus Road. Normally I do not imagine Wheeling will operate in the westerly half of the station.

The distance from the easterly approach at East 40th Street to the station entrance at Huron Road is approximately a mile and a half, or 8500 feet, and Wheeling would not operate ordinarily over as much as half a mile of it. I assumed in my study that Wheeling's tracks would come into the terminal tracks at a point just northerly of Eagle Avenue where appear the words "W. & L. E. R. R. Pos-

sible connection" on Exhibit No. 35. That point is possibly a thousand feet from the mouth of the station proper at Huron Road. In other words, Wheeling would operate over approximately 1,000 feet of the easterly approach out of a total of 8,500 feet. I have seen Exhibit No. 31 introduced by the applicant and I understand Wheeling now proposes to operate or be operated from its own tracks by the connection (indicating) shown on this exhibit into the terminal station by electric train and the empties returned in the reverse movement for outgoing trains, such operation to be over a connecting track to be built between the Wheeling and the terminal tracks. Except for traction tracks which I did not consider it is approximately correct to say that when I attempted to determine the portion of the taxes and interest on the investment which should be charged against Wheeling on a per car basis, I took the figure of $85,000,000 to include, among other things, the westerly half of the station, the entire westerly approach of 9,000 feet, the station coach yard and the entire easterly approach of the station, of which Wheeling would use only about 1,000 feet of the east approach, and apparently only the easterly half of the station. In other words, I have prorated these capital charges of taxes and interest among the four railroads involved on the same basis although Wheeling is getting a very much more limited use of the terminal than the other three railroads and will make no use at all of the westerly approach, the coach yard, the traction portion, the westerly portion of the station and the easterly approach east of Eagle Avenue. That is correct, but, of course, when you go into a facility on any basis you ordinarily stand your proportion of the whole price. I did not make any effort to determine what proportion of the total investment cost of $85,000,000 was represented by these facilities which Wheeling would not use at all. I only studied in a general way the services which will be performed by Terminals for its tenant lines.

I understand an electric engine will bring in Central's trains arriving from the west and passing through the station, taking them to the limits of the electrified zone where they will be turned over to the steam train. In other words, the electric engines of Terminals will have to go as far west as 37th Street to haul in Central's trains arriving from the west and after they have received station service continue to haul them out at least as far as East 40th Street. Although I am not familiar with that, I think approximately the same procedure will take place in the handling of Nickel

Plate trains; Big Four trains would be brought in from the west at about West 37th Street and then returned from the station to that point. I went into this matter only in a general way to arrive at the number of cars. Terminals' electric locomotives would haul Wheeling's trains about 2,000 feet from the connection of a connecting track with Wheeling to the center of the station and return on the outbound movement. For this I have made an allowance by a deduction of 50 per cent of the operating expense items in prorating my figures to Wheeling, eliminating general expense and station service. Included in the item of station service are station supplies and expenses, weighing, inspection and service bureaus, train supplies and expenses—the ordinary primary accounts charged to that account.

The number of cars used for Central was eight and a fraction per train, which is the system figure shown from Central's annual reports. This does not purport to be the figure which relates only to the operation of Central's main line through Cleveland and the same thing applies to Nickel Plate and Big Four as I did not have the means of getting the cars in and out of Cleveland in that study. The system figure would include the figures from the branch lines and Central, Nickel Plate and Big Four, especially Central, have a considerable number of branch lines. It is a fact that the tendency on the branch line operation would be to run less cars per train than on the main line operation so that the figure of eight cars per train would be less than the number on the through trains on the main lines of these companies, although I am not so sure about the Big Four local service. I made no study to determine whether the main line service on the Big Four in and out of Cleveland would require more cars per train than those various branch lines. I would not think any of the branch lines of Big Four would carry more cars per train than the Cleveland-Cincinnati division main line of the Big Four; and the branch lines would probably carry less rather than the same or a greater number. For Wheeling I used three and a fraction cars per train and figured four trains each way per day, or a total of eight. I saw last night Mr. Durham's testimony to the effect that Wheeling now operates 2,503 trains per annum, but did not consider that figure in the study, if I saw his testimony before I made the study.

I understand that the locomotives referred to under the heading of "maintenance of locomotives and locomotive depreciation and retirements" in Exhibit No. 102 are electric locomotives. I have had no experience in connection

with the repair and maintenance of electric locomotives but it is generally accepted that the figure is more than for steam locomotives and I took the steam locomotive figure. I have had no experience in the operation of electric locomotives. I have no figures to show the cost or the quantity of power which would be required for the operation of these locomotives within the terminal area, and arrived at that figure from other studies. I do not have my work sheets to show how I got at the figure of $157,917.57 for "Power purchased or produced"; I made that figure from a study of the Staten Island Railroad,—I telegraphed for that—a somewhat similar operation, you understand. You are limited in this comparison in regard to electric performance because there is not a whole lot of it. My figures are an estimate of what it is going to cost to operate that station. I do not recall how many kilowatt hours in the course of a year would be required nor the price per kilowatt hour. I do not know what that rate is under the Cleveland Electric Illuminating schedules. I heard a figure but I will not say positively what it is, nor anything about energy charges or minimum charges or any of the other things that go with it. Most of my studies were made on steam locomotives and then transposed to this electric power. Of course, the power would be considerably higher than fuel costs, based on the experience of other railroads, not my own but I have got it from people who are operating electric locomotives.

Under the item "Yard trainmen and motormen, $156,147.00," I figured two motormen to be employed in the operation of each electric locomotive besides the train crew doing the switching, six men for a full crew. I figured ten locomotives. I did not figure the time which would be consumed in going from the center of the station to West 37th Street, picking up a Central train, handling it through the station and out to the easterly limits of the terminal area at East 40th Street. I do not know nor does anybody else until you commence operations the number of locomotives or crews or motormen which would be required. As to the value of my estimate, we have the benefit of experience of other railroads but the out-of-pocket cost is a different proposition. For instance, you might determine with reasonable certainty how long your rail would last but it would be pretty difficult to say without experience how much Wheeling's trains would wear out the rail.

Q. Yet, you are proposing here a figure as large as $156,000 without any basis by which we can check whether

the number of men you have assumed would be sufficient or more than sufficient to operate this terminal. A. If I transfer that to our Pittsburgh station, that is what it would cost as we have the same scale at Cleveland as at Pittsburgh. Therefore, I thought that would be a fair figure. The figure is not based on the operation of the steam operated, stubend station of the Pittsburgh & West Virginia at Pittsburgh. I said if I had this situation at Pittsburgh, that is the number of crews I would figure I could handle it with. Transferring it to Cleveland where you have the same wage scale the results would be the same.

The figure for "Injuries to persons" is simply an estimate, and I used the Washington Terminal's figures in a general way. Wherever I got a comparable situation I tried to use it. Taking the item of superintendence under the heading of "Maintenance of way and structures," I figured that about 10 per cent of the total; ours runs about 15 per cent. I figured that the item of $75,250.50 for "Maintenance of roadway and tracks" was about what it would cost from looking over the reports of the roads involved for a number of years, their maintenance costs. I figured the cost per mile would about give you that figure. I figured it would cost about $3,400 per mile to maintain the 22 miles of track. The figure of $77,310.43 for "Maintenance of structures" is an arbitrary figure, being one half of what the Washington Terminal is paying for a similar operation. The heading "Injuries to persons" is an arbitrary figure as is also the item of $10,000 for "Other way and structure accounts." The figure for "Superintendence" under "Maintenance of equipment" was arrived at by taking the average that the Big Four, Central and Nickel Plate bore to the total maintenance of equipment.

I arrived at the figure of $34,261.00 for "Repairs—Machinery and other apparatus" by taking one-half of the Washington Terminal figure. Of course, if you are not going to have any machinery, as somebody stated, that cost would be added to other items directly affected. As to "Locomotive repairs" and "Locomotive depreciation and retirements," those figures are one-half of the Washington Terminal's, which is a steam operation. The $5,550.00 is very low, in fact, too low for repairs to an electric locomotive after it is a few years old. I have never operated or repaired an electric locomotive but I have a pretty good authority for that statement. The figure of $2,000 for "Work equipment repairs" and the figure of $500 for

"Work equipment depreciation and retirements," and the figure of $10,000 for "Injuries to Persons" are practically arbitrary figures, the latter item being one-half of what the Washington Terminal is paying for a similar account.

The figure of "Superintendence," "Transportation—Rail Line" was taken from the percentage that the Central, Big Four and Nickel Plate bore to the total and I added 1.5 for dispatching, which is not included in the other captions. The figure of "Station service, $471,345" is just one-half the similar service of the Washington Terminal. The item "Yard trainmen and motormen, $156,000" is figured on ten crews. The item "Power purchased or produced" was secured from the Staten Island Railroad, which does not have a passenger terminal to the same extent but I was trying to get the cost of power. That is a freight and passenger road but with no large passenger terminal like the Cleveland Union Terminal. The item of "Other yard expense, $28,209" is one-half the Washington Terminal. The item of $10,000 under "Injuries to persons" is a Washington Terminal figure and is an estimated figure, which is likewise true of "Loss and Damage, $1,000" and "Other casualty expense, $3,000." The item of $40,026.64 under "Other rail transportation expenses" is one-half the Washington Terminal. I took all the items of "General" including the item of "Administration, $64,000" from the Washington Terminal. All the "General" items, "Administration," "Valuation expenses" and "Other general expenses" total $85,500.

I used the figure of 6.8 cars per train for the Big Four but I cannot give you the total number of trains per annum or cars per annum for each of the four railroads involved. The figures I used were taken from Mr. Durham's testimony, which was 34 trains for Central, 14 for Big Four, 7 for Nickel Plate, to which I added 8 for Wheeling. Central has 6 and a fraction cars per train; Big Four, 6.8; Nickel Plate, 4.93, and Wheeling 3.45. I got Wheeling's figure by dividing the car mileage by the passenger train mileage.

In reference to the deduction of $850,000 headed "Cleveland Traction Terminal Company's payment for concessions," I do not assume that the only credit against the expenses of carrying and operating this station would be the receipt of $850,000 by the Cleveland Union Terminals Company from the Cleveland Traction Terminals Company. That increases, as I remember it, as the business increases, and I have taken the base rental for the first year, which

might or might not increase in subsequent years and I have not shown as a credit or deduction any other figure than the income from the Cleveland Traction Terminals Company. I did not make any investigation to determine whether the Cleveland Union Terminals Company had any other source of revenue as my study was on expenses and not on revenue. I deducted the $850,000 because that is a credit against the expenses.

I do not know how large the area of the supergrade lands of the area over the station of Terminals is, and have made no effort to find out what credit against the expenses would be produced by any such area. I had, however, examined Exhibit No. 49, the contract between the Terminals Company and the Building Company, and while that contract suggested that Terminals had supergrade or air rights, I did not attempt to arrive at what that was and in any event it is not in my figures. You have a lot of real estate men here for that purpose.

My figures on maintenance of way and structures were taken from the average maintenance of way and structures of Nickel Plate, Central and Big Four. I had those figures and used them for my calculation to arrive at about the figure I thought it ought to be, which is about one-third of the Washington Terminal. The maintenance figures of those three roads are not altogether maintenance in the open country but a good bit so. The station area is covered to a considerable extent, which would eliminate part of the expense from snow, sleet, ice and matters of that sort. My figure on the cost of maintenance of roadway and tracks of $275,250 was computed on an estimated mileage of 22 miles, which excluded the traction tracks. I assumed that was the correct figure for the steam tracks and it is under rather than over, I think. If the figure of 22 miles included any traction tracks my figure on maintenance of roadway and structures would be inflated to that extent. I included in the figure of 22 miles the steam tracks of the station area between the points where the electrified zone starts on both sides, which is on the basis of the final layout of the tracks.

RE-DIRECT EXAMINATION by Mr. Hoppe.

I used the distance of two miles in my calculations from the easterly end of the easterly approach into the station, and a similar distance from the station out to the westerly end of the westerly approach. In making my calculations I had or was shown Exhibit No. 29, which is the application

of Wheeling filed with the Public Utilities Commission of Ohio, and likewise had or was shown Exhibits Nos. 36 and 37. I was likewise furnished with the estimated costs submitted to the Interstate Commerce Commission in Finance Docket No. 1237, showing the total estimated cost of the station at $61,000,000 or thereabouts, and was given the information which appears upon the Exhibit No. 99. I arrived at the item of $71,575 for locomotive depreciation and retirements by taking 4½ per cent of the item I received as the cost of locomotives, which was $1,595,000. In making and considering my calculations I had before me the annual report of the Washington Terminals Company, which is the local union station company in Washington.

PHILIP M. PLATTEN, called as a witness in behalf of the intervener, The Pittsburgh & West Virginia Railway Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Hoppe.

I reside at 11839 Clifton Boulevard, Lakewood, Ohio, a suburb of Cleveland immediately west thereof. I am thirty-five years of age. I was engaged in the real estate business in Cleveland, Lakewood and its suburbs and have been for sixteen or seventeen years, during which time I have acted as broker for nearly all types of property, having bought and sold property for individuals and corporations, appraised property for mortgage companies, individuals, lawyers, banks, etc. I have had some experience in connection with downtown property in the City of Cleveland and with its rental value. I am familiar with the property of Wheeling located on Ontario Street, commonly known as Wheeling's Ontario Street passenger station site.

At the request of counsel for The Pittsburgh & West Virginia Railway Company, I made an appraisal of that property, and based upon my past experience in the real estate business as outlined, I think I know or have the means of knowing what the fair, reasonable, market value of Wheeling's property was on July 3, 1928. I have read applicant's Exhibit No. 48 and examined the maps attached thereto. Directing attention to the map which is marked "Executive Committee Exhibit No. 4," the property shown thereon as the property of Wheeling was the property considered by me in my appraisal.

In my opinion the fair and reasonable market value of the property of Wheeling as shown in Exhibit No. 4 attached to Exhibit No. 48 on the 3rd day of July, 1928, was $7,125,000.

CROSS EXAMINATION by Mr. Boyd.

My appraisal included all the property shown in yellow on the exhibit referred to. As to whether I also appraised the property shown in red on the exhibit, I will say that I included in that appraisal a frontage of 492.83 feet on Ontario Street with a depth of about 71 feet at the narrowest point. Whether that includes the line in red or not I do not know. It makes a total area of 74,515.5 square feet. I did not include in my appraisal all of the property shown in red on that particular map. This is the relocation of Ontario Street. In fact, I included none of the property shown in red and none of the property shown in blue on that map. I did include that part of the property shown with diagonal red marks, that is, diagonal hatching or red lines drawn diagonally, starting at a point on the north at the intersection of the property and Huron Road and running thence southerly, as I would call it, to the most southerly frontage of the Wheeling property on Ontario Street, a point 492.83 feet distant southerly from the intersection of the Wheeling property and Huron Road. My appraisal, therefore, allowed that 492.83 feet fronting on Ontario Street. The irregular long parcel in yellow on the map plus the 490 odd feet of hatched portion on Ontario Street includes all the property that I appraised as and for the Wheeling property, and involved a total of 109,341 square feet. Getting back to Executive Committee Exhibit No. 4, I appraised all the lands shown in yellow on that exhibit amounting to 74,515.5 square feet. I have not got the figures on the hatching and the yellow separate. There are figures on here (the map) but I am not sure that they are correct. I cannot tell you how many square feet shown in hatching was included in my appraisal, but I appraised the land in two parcels and I can tell you the total area of each and the frontage in each case.

Referring to Exhibit No. 11, which is the contract for the sale by Wheeling of whatever property it proposes to sell in this proceeding, I read the same and can take a map that is before me and outline the property so described in that proposed contract but to make certain I should have to read the agreement again. In answer to the request that I use only maps before me, the precise property that I

appraised for the sum which I have named, I refer to Map No. 4 of Exhibit No. 48, starts at a point on Huron Road relocated at a point distant northwesterly about 107 feet from Ontario Street, thence running southeasterly that 107 feet to the intersection of Huron Road relocated and Ontario Street, and thence running what I would call southerly along Ontario Street a distance of 492.83 feet, thence westerly a distance of about 104 feet, thence southwesterly a distance of about 39 feet, thence almost westerly a distance of about 11 feet, and thence southerly a distance of about 110 feet, and thence southwesterly a distance of about 64 feet, thence westerly 58 feet, thence southerly about 97 feet to Eagle Avenue, thence northwesterly along Eagle Avenue about 151.42 feet,—I now purport to be at the corner of Eagle Avenue and Canal Road, and then following along Canal Road toward Huron Road relocated a distance of 212 plus 115, plus 292 feet, and thence along Canal Road relocated another distance of about 263 feet, thence northeasterly to the place of beginning a distance of about 166.14 feet.

That is the outline of the property which I appraised and it is colored in yellow on Map No. 4 of Exhibit No. 48. It comprises a total of 109,341.6 square feet. My appraisal is on a square foot basis. I divided the area into two parcels, one with 74,515.5 square feet and one of 34,826.1 square feet. The parcel of 74,515.5 square feet I valued at $87.50 per square foot. The parcel comprising 34,826.1 square feet I valued at $17.50 per square foot, the latter having no Ontario Street frontage except by reason of its contiguity to the first parcel. My appraisal includes a lineal frontage on Ontario Street of 492.83 feet which is held by the Wheeling partly under lease. I made no particular separation of the portion held under lease but appraised it based upon an agreement, which I understood had been reached, and made an appraisal of the fee rather than of any separate parcel or leasehold. I did not read the lease but do recall that it is a ten-year reappraisal lease. I appraised the whole thing in fee. I do not know whether the leasehold itself has any value in view of its being a ten-year reappraisal lease. I do not recall whether the next reappraisal commences in the year 1932, and considering that I made no examination of the title I do not know what the fact is as to whether or not the Wheeling does not have and never did have a fee simple title to the land under lease.

I appraised the whole thing as though the Wheeling owned the complete title to all of it in fee simple.

[The difference in elevation between the lower end of all this property and the upper end of it on Ontario Street level is some forty feet. The 34,826 square feet has no Ontario Street frontage except for its contiguity to the other land, but in one unit it does have frontage. This 34,826 square feet is at the easterly end of the parcel and between it and Ontario Street there is other intervening land not owned by the Wheeling, so that the only way that it has any sort of connection with Ontario Street is by going westward over the 34,826 square foot parcel until you strike the portion of land that has Ontario Street frontage. I did not figure the appraisal of $17.50 a square foot for that portion of the land on an acreage basis. I am aware that my appraisal of the large parcel of 74,515.5 square feet figures something like $13,000 per foot front on Ontario Street.]

As to pieces of property I have sold in the last ten years in the "downtown area" between East 9th Street and the Cuyahoga River, I have had some dealings in the immediate flats but do not recall offhand whether they were this side or the other side of the river. Aside from that I have had no dealings in that area that I recall. In my examination in chief I distinguished between sales and dealings. I have made no sales in the past ten years in the downtown district between East 9th Street and the Cuyahoga River. I have been in business some sixteen or seventeen years and do not recall any properties that I have sold or purchased during that time between the Cuyahoga River and East 9th Street. I do not agree that the territory between East 9th Street and the Cuyahoga River fairly comprehends the downtown section of Cleveland. I would say it extends to East 22nd Street. Three or four times in the last ten years I have sold the corner of East 22nd Street and Central Avenue, the last time five or six years ago. George A. Phillips was the buyer, the property being about 70 by 80 feet, improved with some old buildings, thirty, forty or fifty years old, used as stores and low grade apartments, which were partly occupied when I sold the property. The last selling price was some $35,000 or $40,000, I forget exactly. That property is right by Charity Hospital and is the same piece I originally owned and sold to a fellow by the name of Blackburn. I do not know who now owns it. I made another very small, cheap sale at 1326 Hamilton Avenue of a property about 25 by 100 feet. There was practically nothing on the property, houses that would cost money to tear down but which were occupied, and I or one of my companies was the seller and a lady

by the name of Curran was the buyer. That sale was eight or ten years ago and I think the sale price was $7,500.

As to what sort of business Wheeling's property is fitted for aside from the railway business that is conducted on it, I consider the rights at and below the surface very suitable for railway terminal purposes and the rights at and above the surface suitable for commercial purposes, buildings such as are going up across the street at Huron and Ontario Street, the Medical Arts Building, the Builders Exchange Building, the Terminal Tower Building, and so on. In addition to that it is very suitable for hotel, department store purposes and theatre or a combination of them. I consider the adaptability is about as high as nearly any property in Cleveland.

A photograph showing Wheeling's property together with adjacent property as it was before Terminals tore the buildings down was marked "Intervener's Exhibit No. 103, Witness Platten," identified, offered and received in evidence.

I see in the extreme left of Exhibit No. 103 what looks like the former Green building, also old Eagle Avenue as it existed prior to two years ago when the new street was built and the old rolling roadway which was in Eagle Avenue on the hill there. You can see in this photograph all of the property about which I have been testifying that can possibly be visible from the worst angle, that is, the rear. I know that The Terminals Building Company bought up all of the Ontario Street frontage beginning with the Wheeling station and running clear out to Central Avenue, and included within the properties that the Building Company has bought is the property which intervenes between Wheeling's 34,826 square feet and Ontario Street.

The general real estate market in Cleveland has varied during the last half dozen years. Land in good neighborhoods has held its own in some cases; in some cases it has appreciated in value; in other cases, in less desirable neighborhoods, it has depreciated. In strategic locations, however, sub-centers and the like, real estate generally has appreciated, particularly the land. I do not know the total consideration paid by the Terminals Building Company for the property at numbers 2126 to 2130 Ontario Street, the corner of old Howe Avenue where the Medical Arts Building is erected. This property is closer to the public square by about 369 feet plus the width of Huron Road than any part of Wheeling's property. I do not know what the Building Company paid for the Smies property at 2120

Ontario Street, nor what the Building Company paid for the Hoyt property at 2122 Ontario Street. The Building Company paid for the property at numbers 2160 to 2170 Ontario Street conveyed by the Ontario Street Land Company the consideration of $225,000 as evidenced by the revenue stamps, for the fee only—I do not have the lease—which figured between nine and ten dollars a square foot. That property is about 166 feet plus the width of Huron Road closer to the Public Square than the north end of Wheeling's property. As you go toward the Public Square you are getting into slightly more valuable real estate. This property which figures between nine dollars and ten dollars a square foot has a frontage of 132 feet and a fraction on Ontario Street and is 181 feet deep. I am familiar with the property at 2140 to 2150 Ontario Street, known as the Palisades Hotel, 70.83 feet on Ontario Street by 150 feet deep along Howe Avenue. The consideration fee paid by the Terminals Building Company was $154,000, which figures around $13.00 a square foot. It is corner property and a well shaped lot. I do not have the consideration paid by the Terminals Building Company for the Parsons parcel at 2180 Ontario Street, 163.31 by 222.41 feet.

The Keller property at the southwest corner of Prospect Avenue and Ontario Street is up where property was pretty valuable at the time of its sale and is more valuable now and is just across from the Bailey Company, one of the leading department stores in Cleveland and from the very popular store of Richman Brothers, both of which were old established stores when the Keller property was sold. Until the terminal development, the east side of Ontario Street has been a better business side than the west side and the high class trade has been on the east side. The Keller property was bought by the Terminals Building Company in June, 1924, for a consideration, I think, of $215,000, which included the buildings. It is 47.75 feet front on Ontario by 90 feet deep and across the alley it is 22 feet on Prospect Avenue by 113 feet, or a total area of 4,298 square feet. There was a furniture store there formerly, I think, a four story brick building. On the assumption which you gave me of $28,950 as the building values the figure per square foot for the land is $27.42 and if you allow nothing for the building values the figure is about $31 or $32 per square foot. At times in the last ten years some parts of the Wheeling land have been worth as much as this Keller land. The peak of values in this neighborhood at present is between the north side of Huron Road and the Public Square. I would

say that the Wheeling's property is worth $87.50 a square foot because it has railroad frontage; if it did not have railroad frontage and if the tracks and railroad facilities were withdrawn from it and adjoining property I would say it would be worth 35 per cent less than that amount, that is to say, $30.00 a square foot of its value is due to the fact that it has railroad frontage. The air rights at the corner of Ontario Road and Prospect Avenue, on the Public Square, on which the Terminal Tower Building is erected, was sold by the Union Trust Company to the Cleveland Terminals Building Company in December, 1927, at $82.00 a square foot and it sold at that price because it had railroad frontage.

It may be true that The Union Trust Company held that property in trust for the Terminals Building Company for some years. I do not know who the party was that originally had the title until they deeded it to The Union Trust Company in trust for the Building Company. I do not know whether Mr. John D. Fackler owned an interest in the corner. As to whether the transfer about a year ago to The Union Trust Company was in no sense a sale it is a matter of public record. I know that The Union Trust Company has for years been a trustee, taking title to the property purchased by and for the Building Company but do not know as a fact that when they made the transfer a year or so ago it simply meant that the trustee was transferring the title over to the person or corporation for whom it held the property in trust. I know that the air rights were sold and that land trust certificates were sold to the public on the basis of $82.00 a square foot. That is one of the most valuable corners in Cleveland and the public paid for it on that basis. It has been so during all my business career. I do mean to say that there is a comparison between the values of property on that Public Square corner and the property down by the Wheeling depot.

The Wheeling's property at this time is not any higher in value than any of the frontage on the west side of Ontario Street between the Square and the Wheeling property, but was once more valuable before some of the individual parcels between the Wheeling property and the Terminals property were required for terminal purposes. Those parcels then were just individual parcels totally devoid of any railroad frontage. One property on Ontario Street having terminal railroad frontage of the Terminal Company that was sold is 2014 Ontario Street at the corner of Champlain, at $163.00 a square foot. This is the property at the north-

west corner of Champlain, half a block from the Square, and improved with a brick building, but I do not know its age nor did I appraise it. The price included the building but I do not know the price placed by the buyer and seller on the building.

Going back to the land on Ontario Street which is south of the Wheeling and which for 25 or 50 years has had railroad service and frontage, the property at 2336 Ontario was sold by Rosa Maschke to the Terminals Building Company in April, 1922 for $23,800, or $14.93 a square foot, the area being 20 by 79 feet or 1,584 square feet. There may have been some old buildings on it but I cannot tell you what they were. This property so far as railroad frontage or service is concerned has had no change up to date. The New York Central is the biggest railroad in Cleveland and the Pennsylvania comes next. The property at 2048 Ontario Street sold in 1923 at $93.04 a square foot; at 2056 to 2060 sold in 1923 for $93.98 a square foot; a total of between $436,000 and $437,000 for the latter property. I consider that these properties had railroad frontage, namely, the Terminals, although there is not any railroad there yet and these sales took place six or seven years ago. There are some railroad tracks for building purposes, that is, hauling material but these properties never had any railroad service until they commenced to haul materials in to build the terminal. Those were properties purchased by the Terminals Building Company or The Cleveland Union Terminals Company for the purpose of acquiring property to build the new union depot. As individual properties they never had railroad service and they are consumed in the Terminals property and, of course, above the terminal there is to be a building erected. The Y. W. C. A. property at 2364-70 Ontario Street was sold by the Young Women's Christian Association to the Traction Stores Company for $72,100 in 1928, the area being 51.5 by 126 feet, making a price of $11.08 a square foot. I think there were buildings on the property but I don't remember what they were. This property is between Eagle Avenue and the Wheeling station, that is, a short distance from the end of Wheeling's Ontario Street frontage, being one of the frontages between the rear of the Wheeling and Eagle Avenue. It has a depth of 126 feet which is sufficient for most buildings.

I don't believe I have the actual figures on any more recent sales along Ontario Street and south of the Wheeling. I don't recall offhand any piece of property in and about Cleveland fronting anywhere on the New York Central lines that has sold as high as $10.00 a square foot at any

time during the last ten years. I would not say there had been no such sale. Likewise I don't recall offhand any piece of property on the Pennsylvania anywhere from the Lake front through to Newburgh that has sold in the last ten years at $10.00 a square foot fronting on either side of that railroad. I don't recall any sales of property along the Pennsylvania Railroad and would not consider that pertinent in this investigation. At about 25th Street and Pittsburgh Avenue on the Nickel Plate the Deibold Brewing property recently sold for around $8.00 a square foot. Terminals appropriated that parcel. I do not know whether the jury's verdict read $3.00 a square foot for the land value. I testified in that case for the Deibold Brewing Company and as I recall it my appraisal was $8.00 a square foot. The property had all the Nickel Plate privileges and the Nickel Plate ran alongside of it. Nickel Plate paid $900,000 for an appropriation deed but did not get full title to the property and had to tear the buildings down so that it cost that much for the land. I do not know about the number of buildings on the land except that some of them were reasonably modern factory buildings. I testified in the appropriation proceedings as to the land value separate and testified about $8.00 or $10.00 a square foot. I do not know that the jury's verdict read $3.00 per square foot for land valuation; that may have been the case but I did not see it myself. The total for the land and buildings was $836,000 but, as I said in that case, the buildings, all things considered, would have to be very much altered and torn down and they did not play very much part in that value. The price of $8.00 a square foot included the value of 21 buildings but was for an appropriation title and not a full warranty deed. I do not recall offhand any piece of property which has ever sold for as much as $5.00 a square foot located across the Nickel Plate bridge across the Cuyahoga through to East Cleveland. I would not consider such sales pertinent to this matter. When mentioned, I recall the Harvester case, where the big Harvester stands at 55th Street and the Nickel Plate. I am not sure that the land on which that building stands and which was built within the last two or three years was sold by John Stanley and his sister at 92½ cents a square foot but would not deny it is the figure. Upon mention, I recall the modern plant of the Kroger Company a short distance from 55th Street, which was put up about four years ago. I do not remember nor do I deny that the whole 2¼ acre piece of ground was bought by the Kroger Company at 93 and a fraction cents a square foot. Upon mention, I recall that

the Marine Hospital property on the lake front, nearly 400 feet on East 9th Street and 400 feet on Lakeside Avenue, was sold by the United States Government to Harry Koulby, the property fronting for 400 feet on the Pennsylvania and the Central. I do not recall and do not deny that the price paid for that property by Harry Koulby was about $3.40 a square foot. East 9th Street is one of the principal downtown high class business streets running north and south and the Marine Hospital property overlooks the lake, East 9th Street being the principal thoroughfare leading to the lake front and to the docks and passenger landings on the lake front as well as the new proposed public stadium.

I sold property on the east side of the river downtown on Merwin Avenue but none that I remember with railroad frontage. The last parcel having railroad frontage which I sold was out in Maple Heights, a five acre parcel on the Pennsylvania at Dunham Road. It has splendid railroad facilities except that topography of the land prevents the exploitation of more than perhaps one-fifth of that parcel and it is an entirely different development than Wheeling's property. In the case of the Wheeling property downtown its low elevation on one side operates to its advantage rather than its disparagement and in the other case it hurts. I sold the Maple Heights parcel for $12,500, about 5 cents a square foot, within the last three years.

In my appraisal of the Wheeling property at $87.50 a square foot I said 35 per cent was attributable to the fact that it had railroad facilities and accrued to the sub-surface rights. This is because it is desirable for terminal purposes, probably its highest use. This does not necessarily mean that the value attaches to it because the Terminal Company has to have it and I am not placing any value on it for that reason. I do not know as a fact that the Terminals Company has to have it except from what testimony I have heard here in this case. In order for anybody to realize on an investment of $87.50 a square foot for that portion of Wheeling's property which faces Ontario Street, something less than 74,000 square feet, he might do several things with it. He might develop it as a terminal at and below the surface and create somewhat the same kind of business development as is occurring across Huron Road where the Terminal is putting in buildings of the same type. Wheeling could develop a terminal on it and get the B. & O. and Erie in there jointly with it. It is true that the Wheeling has used it for a terminal as long as I have lived but it is now an obsolete terminal by vir-

tue of the fact that another terminal is being built on the Square. If developed as a terminal that would account for $30.00 a square foot of its value. One way of developing it so as to account for the other $57.50 a square foot of value and earn a return on it or justify it would be, as I cited before, to build buildings of the same character as exist across Huron Road. In addition to that a hotel might be built there in propinquity to these other large, fine buildings that are there now, a theatre might well be developed there. That is getting to be quite a business center. Those new buildings which have been built have had a very dominating influence on the neighborhood. Not much new business has come in there south of Huron Road in the last twenty-five years. The territory has been in a temporary state of inertia since about the time the Terminals Company arrested the development, that is, about 1912 or 1914. Most of the business south of Huron Road and from there out to Central Avenue has gone out. I don't recall the businesses which have been established there between Central Avenue and Huron Road in the last fifty years but there have been lots of them. The old city market is across Ontario Street between Central Avenue and Huron Road and has been there as long as I have lived. The east side of Ontario Street has always been a better business section than the west side. There have been the Southworth Company, the May Company—part of its buildings—the Bailey Company, the Richman Company, and lesser concerns as you go on towards the south. Because of the fact that most of that property is leased on a 99-year lease basis, there have not been many sales on that side of the street. I don't recall any. As to whether there have been any sales in the last twenty-five years from the Public Square to the City Market House on the east side of Ontario Street, Robert Buckley recently acquired a piece of property but I do not know whether by lease or purchase, nor do I recall the price. I know the Haag property at the southeast corner of High Street, occupied by a business building, but do not know that it has been on the market for sale by the Haag heirs for at least five years nor the price at which it has been offered. I know the property opposite the old market house at the corner of Ontario Street and East 4th Street and Bolivar Road. I do not know whether it has been for sale nor the price. There have not been many sales south on Ontario Street beginning with Huron Road and running to Central Avenue during the last ten years; I do not recall any and as I said before, there has not been any activity there. They have been waiting. I think

new business houses have been established in the last twenty-five years from Huron Road to Central Avenue but I cannot recall them by name. I do not recall that the Sheriff Street Market was the last business which was established on that side of the street between Huron Road and Central Avenue.

I have figured on the cost of such a development as a hotel or office building on the Wheeling property, in this way: that it would not cost any more than the others on Huron Road. I have considered a hotel with reinforced steel bearing and concrete bearing of very much the same character. The hotel might or might not cover the entire property. The cost of putting up such a hotel covering the entire property would be the same as any place else. I have not drawn a set of plans in order to figure the cost of the building and would have to have the plans to do so. I have figured one would be justified in providing for a hotel down there having from 300 to 600 rooms, maybe more, depending on whether you utilized the entire area of the property or not. You would not be paying $87.50 a square foot for it because I attribute 35 per cent of its value to sub-surface rights.

I have never had occasion to figure on any particular building with respect to the extraordinary cost of constructing a superstructure over a railway terminal or over railway tracks, but from your experience in building the terminal I know something about provisions which must be made to protect the public carrier, namely, the railroad or railway terminal in such an instance. I know something about the cost of these things from your published statements and the Wall Street Journal. I understand you have spent about $61,000,000 so far and expect to spend about $27,000,000 more before you get through. This has to do with the value of Wheeling's property and its utilization for any purpose only so far as the terminal development has already gone. My appraisal is absolutely independent of the necessity of Terminals to have it. I have had in mind all along the utilization of the so-called air rights by anyone who might be the owner, whether Terminals or anyone else. Wheeling could build such a development as a hotel, department store or theatre and the property would be committed to any one of those uses profitably on that valuation. I don't recall the sale and lease considerations underneath other hotels, but I can tell you the tax valuation of some of them. I have forgotten the tax valuation of Wheeling's property. I took the tax value of the Wheeling property into consideration in my appraisal of $87.50

per square foot only to the extent that I did not think it had any bearing on the market value because it was so ridiculously low. If it had been ridiculously high the same rule would have applied but if it had been reasonable I would have taken it into consideration.

My best memory is that the piece of property which represents the highest value per square foot of any property which I ever bought or sold, either for myself or for anybody else, in Cleveland was the property on Hamilton Avenue at $3.00 a square foot. I bought and sold particularly for others and slightly for myself all kinds and classes of property, retail and wholesale, industrial, railroad and everything.

A photograph marked "Exhibit No. 104, Counsel, Boyd," was identified, offered and received in evidence.

Exhibit No. 104 represents a view of the Wheeling & Lake Erie tracks together with a rear view of the Wheeling depot building as it was before the buildings on Ontario Street were torn down. The tearing down of these buildings commenced several years ago and was completed within the last year or two. The photograph is a fair representation of the conditions as they were before they started to tear down the buildings. As things are today there are no buildings along that side of Ontario Street except the Medical Arts, the Builders Exchange and the Terminal Tower Building. Exhibit No. 5, already in the record, represents the Ontario Street frontage of Wheeling's depot building as it was after some of the adjoining structures were torn away. I do not know whether the Interstate Commerce Commission has placed a valuation on this land of Wheeling and have had no occasion to look into it.

Adjournment.

May 15, 1929.

RE-DIRECT EXAMINATION by Mr. Hoppe.

The property sold by the Young Women's Christian Association to the Traction Stores Company, located at 2364 to 2370 Ontario Street, about which I have testified, is covered by a lease and the consideration paid therefor did not include the leasehold. There was likewise a lease on the property sold by the Ontario Street Land Company at 2160-70 Ontario Street, concerning which I testified, and the consideration paid for that property did not include the lease. I do not know what was paid for the lease.

In arriving at the value which I have placed upon Wheeling's property I took into consideration the sale prices of other properties in the community. I considered the sale of the Central Police Station site on Champlain Avenue at the corner of West 6th Street, comprising some 37,600 square feet of land, sold for $1,200,000, or $31.91 per square foot. That property was very much off the beaten path and in the midst of very old dilapidated buildings where the rentals were at that time not very high. I also considered the sale of the Fire Engine House on Champlain Avenue at the corner of West 2nd Street, a parcel 41.25 feet on Champlain and 80 feet on West 2nd, running back to Diamond Court, comprising 3,300 square feet of land. It sold for $165,000 or $50 per square foot. The City of Cleveland was the seller of these two parcels. Then there is a third parcel I took into consideration known as the fire engine and signal station property on the north side of Hill Street near Commercial Hill beyond the Central Viaduct, which sold for $268,400 for some 8,250 square feet, or $32.53 per square foot. I also took into consideration the parcel at the corner of Ontario Street and the Public Square, formerly 2002 Ontario Street, 21 by 67 feet comprising 1,407 square feet, which was sold for $416,000, or $295.66 a square foot. The last parcel is on the same side of Ontario Street as Wheeling's station, some 1,000 to 1,500 feet distant therefrom. It is part of the property upon which the Terminal Tower Building is now erected.

The $82.00 a square foot for so-called air rights in reference to which I testified on cross examination was a valuation upon the basis of which land trust certificates were issued in addition to the $295.66 per square foot. That was a separate and distinct sale.

I considered the sale of another piece at 2006 Ontario Street, size 21.22 by 67, having 1,407 square feet, which sold for $232,197 or $163.28 per square foot. This parcel is likewise a part of the property upon which the Terminal Tower Building is erected. I considered another parcel at 2014 Ontario Street, at the corner of Champlain Avenue, size 21.11 by 67, having 1,414 square feet, which sold for $232,500 in 1924, or $163.72 a square foot. I considered another parcel at 2010 Ontario Street under the Tower Building, 21.11 by 67, having 1,414 square feet, which sold for $170,000 in 1923, or $120 a square foot; also a parcel at 86 and 92 The Public Square, 45 by 84 feet in size, having 3,803 square feet, which sold for $400,000, or $105.-

18 a square foot. I considered the sale made in 1925 of a parcel at 78 and 82 The Public Square, 38 by 84 feet, having 3,211 square feet, which sold for $200,000, making $62 a square foot; also still another parcel sold in 1924 at 74 The Public Square, 36 by 84 feet, having 3,042 square feet, which sold for $275,000, or about $90.40 a square foot. All of these properties which I took into consideration and just enumerated are located on Ontario Street or the Public Square and between the Public Square and the new Prospect Avenue as it has been built across the terminal area. It is upon this property that the land certificates about which I have testified in cross examination were issued as against the air rights at $82 a square foot.

I also considered the sale of a parcel at 2036 Ontario Avenue, at the corner of Champlain, 40 by 120, 4,800 square feet, sale price $240,000, square foot price $50; also a parcel at 2048 Ontario at the corner of an alley, 23 by 100, 2,300 square feet, sale price $214,000 in 1923, at about $93 a square foot. I further considered the sale of a parcel at 2052 Ontario Street, 22.5 by 100, 2,250 square feet, sale price $190,406 in 1923, square foot price $74.62. I considered property at 2056 Ontario, at the corner of Prospect, 46.5 by 100, 4,600 square feet, sale price $437,000 in 1923, square foot price $93.98. The parcels enumerated at 2036, 2048, 2052 and 2056 to 60 Ontario are between the Public Square and Prospect Avenue extended and are within part of the so-called air rights concerning which I testified that were appraised at $82.50 per square foot.

I considered the Samuel Kellar parcel at 2092-98 Ontario Avenue, 47 feet 11 inches by 90 feet, making 4,313 square feet, sold in June, 1924 for $184,900, or $42.87 a square foot. This sale was before the Terminal Tower Building or any of the terminal buildings in that vicinity had been erected. Another parcel considered was at 2108 Ontario, 65 by 90 feet, making 5,857 square feet, purchase price in 1924 $200,000, square foot price $34.15. There was a lease upon that property and the sale price was for the fee or reversionary interests only not including the lease.

I took into consideration the parcel at 2112 Ontario, 21.17 by 90 feet, sale price in 1923 $83,839 or $43.94 a square foot. That was an appropriation sale and the amount of $83,839 represents the verdict of the jury in 1923, before any of the terminal buildings which now stand and have stood for the past two years in that vicinity were erected. The parcels at 2092, 2108 and 2112 Ontario are located between Huron Road and Prospect Road extended

and are between four and five hundred feet from Wheeling's property. In many cases the fee and leasehold estate were sold separately and it was difficult to get accurate information as to the selling price of the lease.

I considered the property located at 2140 to 2150 Ontario Street, at the corner of Howe Avenue, sold by Brown, Clark & McCook to The Union Trust Company in 1922. This parcel was 70.83 by 107 or 12,070 square feet and the price for the fee only was $154,000, or $12.76 per square foot, that is, exclusive of or subject to the lease. This was also prior to any of the development work of Terminals in that neighborhood. On cross examination as to the various elements which I took into consideration in determining the value of $7,100,000 placed on Wheeling's property, I did not state everything which I had taken into consideration in arriving at that figure. I considered that the Wheeling was in a position where its property could not be appropriated and that if it did sell to the Terminals Company, it is generally known that the property between level 52 and 72 would be used for steam railroad and traction purposes, and it is generally assumed that the Shaker Rapid Transit would be one user of those tracks, and, in addition to that, it is generally assumed that street railway cars will use it and other rapid transits. As a result of that use a great number of people will be brought into the depot, which is only about a thousand feet from the Wheeling property.

I considered further that Prospect Avenue and Huron Road extended will tap into Superior Avenue, which is the present main artery to and from the west side, and will divert a goodly part of the traffic that would normally go to and from Superior Avenue; that the New Central Viaduct, about 300 feet south of Wheeling's property, is now a certainty; that Carnegie Avenue will be extended in a manner so as to connect with the New Central Viaduct and thus create a new thoroughfare through town from the east to the west; and that the Wheeling property is just about midway between these two new traffic arteries which will carry most of the traffic to and from the east and west sides.

I considered further that as a result of the people that will be assembled there the Terminals Company felt justified in building the new Terminal Tower Building at a cost of some twelve million dollars. About 80 per cent of the space in that building is now rented at from $3.00 to $4.50 per square foot; that the Builders Exchange Build-

ing and Garage and Medical Arts Building are now being erected at a cost of some six million dollars, and that considerable of the space in the Medical Arts Building has already been rented.

I considered further that about one-third of the population of Cleveland lives on the west side and that most of it will come back and forth between the arteries I have heretofore enumerated.

I considered further that if the Wheeling were to lease a right of way and easement under their property to the Terminals interests, retaining in the grant underground passageways to and from the depot, they would nearly as fully enjoy the development that has gone on as the Terminal Company itself.

I considered further the sale of the property which I mentioned several times before, the air rights of $82 a square foot under the Terminal Tower Building.

After having visited the cities of Chicago, New York and Philadelphia and making a study of the effect that this kind of development has on adjoining property, I came to the conclusion that the Wheeling property is worth, subsurface rights included, $87.50 a square foot, or a total in round sum figures of $7,125,000.

From the various exhibits offered here it is apparent that the extensions of Prospect Avenue and Huron Road run from Ontario Street in back of the Terminal Tower Building out to Superior Avenue. Superior Avenue at present is the main traffic artery for both street cars and automobiles between the east and west sides. The Central Avenue Viaduct is a bridge which will be constructed between Central Avenue on the east and about Columbus and Lorain Avenue on the west and will carry jointly with the present Superior Avenue Viaduct all traffic going between the east and west sides from downtown except the little traffic that might go through the flats. Between the east and west sides of Cleveland is the industrial section located in the Cuyahoga River Valley. Heretofore the city has had but one viaduct across the valley, being the High Level Bridge or Superior Avenue Viaduct. The Central Avenue Viaduct will be similar thereto and the Wheeling property would then be located about midway between the Central Avenue and the Superior Avenue Viaducts. Carnegie Avenue is one, if not the main automobile artery running east and west on the east side. At present, starting downtown it runs from East 22nd Street between Prospect and Central Avenue easterly to University Circle at about 107th Street

and from there highways lead to all parts of the Heights, the better residential section of metropolitan Cleveland. There are on the Heights a number of little towns and villages such as Cleveland Heights, Shaker Heights, University Heights, Mayfield Heights, East Cleveland to the north, Maple Heights, Miles Heights, Warrensville and possibly three or four others. Carnegie Avenue varies from 80 to 100 feet in width and accommodates six lines of traffic. Carnegie Avenue is to be extended into the downtown area connecting with the new Central viaduct, and the exact course of that route is being kept quiet until the property necessary therefor is acquired.

Re-Cross Examination by Mr. Boyd.

The Central Police Station was sold for $1,200,000, the property being located on Champlain on the north side, Long Avenue on the south side and a short distance from West 3rd Street. The Central Police Station was the central point into which ran all the underground conduits and wires for the police signal system of the city, which was installed and in use in that building as well as the central jail system and its entire complement of cells. It was in complete use, and it was a sale of all the property there. The three story police station building was included in the sale and there was a building there that had been built some thirty years. The sale included not only the station building but the police garage and barn building. There was no lease on the property and the sale was of the fee, at $31 per square foot. I do not know what value was placed on the building and all its equipment in figuring the sale price of $1,200,000. The Central Police Station was within a short city block of Superior Avenue.

The fire engine house stood at the corner of Champlain and West 2nd Street about two or three hundred feet from the Public Square, the building being two stories and containing complete fire signal equipment and other equipment. The sale included the right of the purchaser, namely, the Building Company, to take up and remove such part of the conduit system as communicated with the fire engine house. All those rights together with whatever permanent equipment there was in the building that belonged to the fire system went with the sale of the building. I have figured the amount of money received by the City for all those rights and things purely as land value. The fire engine house was directly through Diebolt Alley from the corner of the Public Square almost facing Diebolt Alley

about 200 or 300 feet from the Public Square. The fire engine house was across the street and consequently that much farther away from the Square. What I have said with reference to the fire engine house on Champlain and the price and the things that went into it which the city surrendered with the price applies equally to the sale of the fire engine house on Hill Street. The City sold all those things for the price named and I have figured that price as the land value at so much per square foot. The buildings in each case were obsolete and worthless.

The Cleveland Protestant Orphans Asylum property at 78-82 The Public Square, on the south side thereof, was improved with an old building, right up to the time the Terminals Company bought and tore the same down. I do not know what the seller in negotiations for the sale considered the land and buildings worth separately. As to all properties about which I testified I have taken the total price paid by the Building Company to the owner for his land and building and put it on a square foot basis of land value. All the properties which I have named were occupied by buildings, such, for instance, as the northwest corner of Ontario and Prospect Avenue extended, known as the Davis and Hunt property, improved with a four story building. Davis and Hunt was one of the leading wholesale and retail hardware merchants of the City of Cleveland. They had been in business (down town) for a quarter or a half of a century. At the time the sale was made they were doing a very good business in that building. The sale of the property included the building and they moved away to other quarters. It also included the cost of tearing down which I did not figure in my vacant land valuation.

I considered that the Wheeling property could not be appropriated and considered that it will add great facility to the Terminal project. Until a couple of years ago I never heard a suggestion that Terminals could in some way get around Wheeling's property. In making my appraisal I considered that Wheeling might give Terminals an easement underneath for its reasonable value and then enjoy the air rights and all the benefits of the present terminal development; in appraising this property I considered the fact that Terminals could go down under Wheeling's property by underpinning the development itself. I have not considered what Wheeling's property would be worth if the Terminal development is not completed but that would reduce its value very materially.

I visited Chicago about three months ago. I did not talk with the engineers of any of those who brought forth the air rights development that is there.

In saying we had one viaduct across the valley I did not consider Central Viaduct because it is nearly ready to pass out because of the new Central and Lorain Bridge. There is no proposition to take it away, but to furnish a new modern bridge. Wheeling's property is midway between Huron Road and Prospect Avenue relocated which tap into Superior Avenue and the new Central Bridge. The peak of values on Carnegie Avenue was reached in anticipation of the widening of the thoroughfare three or four years ago and has since gone down.

The Terminal Tower site is 150 feet away from Ontario Street. The nearest point of the Terminal Tower Building to Ontario Street is about 110 feet, and that 110 feet is a unit which is to be occupied, as people generally understand it, by a department store building to be hereafter erected. The $80 a square foot appraisal which I spoke of applies only to the land comprised within the so-called Terminal Tower unit.

RE-DIRECT EXAMINATION by Mr. Hoppe.

A blue print map marked "Intervener's Exhibit No. 105, Witness Platten" was identified, offered and received in evidence.

Prior to the terminal development Champlain Street started at Ontario Street at a point three or four hundred feet south of the Public Square and then ran west down hill into Canal and Columbus Roads. Prior to the terminal development the improvements along Champlain Street were all industrial with the exception of some retail business at the top of the hill, considerably east, however, of the police station. West of the police station site was entirely low grade industrial property. The police station stood at number 98 on Exhibit No. 105, the fire station at number 39. West Champlain Avenue, West Prospect Avenue and Long Avenue have now been vacated as well as West 2nd, West 3rd and West 6th Streets. Prospect Avenue Southeast, shown coming into Ontario Street from the east, has been extended by Terminals, as indicated, across Prospect Avenue Northwest and Champlain Avenue into Superior Avenue. Huron Road Southeast as shown on Exhibit No. 105 comes into Ontario Street from the east and has likewise been extended over the terminal area as indicated by "Huron Road proposed." The only building

on the block indicated on the map as "Public Square" is one monument. The Public Square is a small park or four small parks, one on each corner. There are small merchants on some of the corners but the May Company is, of course, close by at the southeast. (Witness traces location of the May Company on Exhibit No. 105, writes word "May" at such location, also the word "Bailey" at the location of Bailey Department Store.)

RE-CROSS EXAMINATION by Mr. Boyd.

The Williamson Building is on the Public Square at the corner of Euclid and is a sixteen story office building with a bank and stores below. The Huron Building is an eight story office building facing the Public Square at the corner of Superior Street and has stores below. Across on the other corner of Superior Street is the Federal Building, housing the post office, the courts and all federal offices. Then comes the Chamber of Commerce Building now unoccupied. Then the Society for Savings Building, exclusively a bank and office building; then the Old Stone Church; then the fourteen story Electric Illuminating Building, occupied exclusively by its office and executive force; then the Old Court House and jail buildings; then on the west side of Euclid is the twelve story Ulmer Building; then at the northwest corner of Superior is the Marshall Building of eleven or twelve stories; then the Cleveland Hotel, a modern twelve or fourteen story hotel. At the southeast corner of the Public Square is the Park Building, which is an office building with stores below. Across the alley from the rear end of the Park Building is the May Company partly facing the Public Square and running far enough to be on Euclid Avenue proper. The names of the buildings just given surrounding the Public Square are fairly exhibited on Exhibit No. 14 already in evidence.

O. C. SAUM, called as a witness in behalf of intervener, The Pittsburgh & West Virginia Railway Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Hoppe.

I have resided in Cleveland and East Cleveland for the past thirty-three and a half years, and am fifty-seven years of age. I have been in the business of real estate service for about seventeen years, and for twelve years

preceding that I was in the general brokerage or real estate business in Cleveland in my own name. Five years preceding that I was employed by and most of the time an officer of the Frisbie Realty Company, the predecessor of the present Berwald-Stewart Company. Prior thereto I was for three years with a real estate firm in the city of Washington, from which I moved in October, 1905. Prior to the time I went into the business of selling real estate service I had considerable occasion to negotiate long term and short term leases both for myself and others as lessor or as lessee. My business of selling real estate service consists of appraisals, buying service and counsel service. I have made appraisals for various individuals, banks and attorneys in connection with estate matters, and in the last seven or eight years over half my business has come from or through attorneys directly or for their clients. For two terms I have been a member of the valuation or appraisal committee of the Real Estate Board, which has maintained an appraisal business for the past twenty-three years. I have acted as agent of the buyer of practically all classes of real estate, which of recent years has been quite largely industrial, manufacturing and business property. My counsel service has consisted of acting as counsel or advisor on a great many kinds of real estate questions or problems as to which I feel from experience and ability able or competent to serve. Based upon my experience in selling real estate service for the past seventeen years and my experience as a broker, buying, selling, leasing and so on, I think I know or have the means of knowing the fair, reasonable market value on July 3, 1928, of Wheeling's property, which I was requested to appraise and which is commonly known as its Ontario Street passenger station site. I was requested to appraise the property which is shown in yellow on Exhibit No. 4 attached to Exhibit No. 48. In making my appraisal I made investigation to ascertain at what prices surrounding land had been sold during a period of five to six years preceding July 3, 1928. In determining the fair and reasonable market value of Wheeling's land I took into consideration its location and all possible elements or factors that I believed or felt were pertinent to arriving at a valuation.

For example, location of this property is a primary factor or element of value. It has a frontage of about 493 feet on Ontario Street, as it is to be widened, and 97 feet on Huron Road, as relocated; Ontario Street being a main thoroughfare extending from the Lake, or practically so,

south, straight down through the city, counting the extension of Broadway as practically the same as Ontario Street. Huron Road, as relocated, extends from Ontario Street west over the so-called terminal development to where it intersects with Superior Avenue at about West 9th Street, and extends easterly, some four or five blocks, to Euclid Avenue which is the main thoroughfare of the City of Cleveland.

I made quite an extensive study and investigation of similarly situated properties in other cities, including New York, Chicago and Philadelphia.

The property is located some two hundred feet, or thereabouts, south of the southerly part of the so-called terminal development, or closer than that if that development is considered to come down to Huron Road, as relocated. Prospect Avenue is within another 150 or 200 feet to the north. That street also extends now and will extend, as relocated, across the so-called terminal development, intersecting Superior Avenue at West 6th Street and going to the south or rear of the Cleveland Hotel and the recently erected Terminal Tower Building.

Principally on account of the existing streets of Ontario, Prospect, Huron, Euclid Avenue and Superior Avenue, the latter being a little further to the north, this property is located so as to get the benefit of a very intense or quite intense convergence of traffic.

I understand that if Wheeling's property were owned by a private person or company and the owner thereof was unable to agree with The Cleveland Union Terminals Company as to the use thereof by the latter, The Cleveland Union Terminals Company could appropriate only so much thereof as it needs, which, I understand, is a right of way or easement to cross the property with its tracks at level 52, the owner retaining the balance and all the benefits and advantages that would come to it by reason of such use by The Cleveland Union Terminals Company and surrounding improvements. I understand that inasmuch as Wheeling's property is owned and used by Wheeling, it being a railroad, the same cannot be appropriated by The Cleveland Union Terminals Company. Accordingly Wheeling is in a position where it can grant an easement or right of way to The Cleveland Union Terminals Company for its tracks, reserving to itself the right to use the property above and below the tracks and reaping all the benefits which might or will accrue to such property above and below the tracks. This led me to a study and quite an ex-

tensive investigation of the development of so-called air rights above the tracks of railroad companies, which investigation and study I took into consideration in arriving at the value of Wheeling's property. Among other things I took into consideration the sale of air rights upon which the Terminal Tower Building is built. These air rights over the depot of The Cleveland Union Terminal Company, comprising an area of some 71,527 square feet, were owned by The Cleveland Terminals Building Company. They were conveyed to The Union Trust Company of Cleveland, Trustee, which sold the same to the public in the form of land trust certificates. These land trust certificates were sold, on an earning basis of 5½%, at $82 and a fraction per square foot. After the sale of these land trust certificates The Union Trust Company, Trustee, leased the same to The Cleveland Terminals Building Company for ninety-nine years, renewable forever, which then put out an issue of 6% leasehold bonds and erected upon the air rights so involved the Terminal Tower Building. This sale and use of air rights is the only one of its kind that I was able to find in Cleveland except for a somewhat similar air right development made some fifteen or eighteen years ago by The Cleveland Athletic Club, which leased the air rights on top of a four story building and erected its club house there.

In New York and over the tracks of the New York Central and principally around the Grand Central Depot, the air rights development extends from 42nd Street north to 51st Street and perhaps a little farther. Both sides of Park Avenue, both sides of the short street known as Vanderbilt Avenue, nearly all of the westerly side of Lexington Avenue between 42nd Street and 51st Street and much of the easterly side of Madison Avenue between 42nd and 51st Streets are occupied by buildings built on air rights and over the tracks of the New York Central. Among such buildings are the Commodore, Biltmore and Roosevelt Hotels, the Graybar Building, and the Railway Mail Building, the New York Central Building, the Postum Building, Grand Central Palace and a number of other buildings which are a mixture of office buildings and apartments, and then there are clubs such as the Yale Club, Princeton Club and others. Through inquiry I learned from brokers who deal in these air right spaces as to what is considered their value. I secured certain data in the way of prices.

Last October I spent several days in Chicago where I found the development of air right space over railroad tracks was comparatively new. A building known as the Chicago Evening News Building located a little northwest of the Loop district was then about half completed. Over the tracks of the Chicago & Northwestern Railroad and within a few blocks of the Chicago Evening News Building there is an area of two whole squares of land having a frontage on the Chicago River and one side abutting on Kinsey Street, the other on Wells Street and I forget the other, which is being developed by Marshall Field & Company with a large structure which cost thirty million dollars. The pillars or caissons go down pretty deep in Chicago in order to get bed rock. The pillars or caissons for the Marshall Field Building were being poured in concrete when I was there. I conferred with several brokers and with the Chief Land and Tax Official of the Chicago & Northwestern from whom I secured considerable data and figures which I took into account in arriving at this valuation.

In Philadelphia I spent several days. The Elverson Building, sometimes known as the Philadelphia Record Building, is built over the tracks of the Reading Railroad. I secured an appraisal of the sub-surface rights and also of the air rights upon which the Elverson Building stands. The project of the Pennsylvania Railroad in Philadelphia at or nearby its Broad Street Station promises to be the largest development of air rights of anything I have been able to find.

It is known that the so-called Shaker Rapid Transit will use the union depot of The Cleveland Union Terminals Company, and the probabilities are that the Cleveland Street Railway Company will also use it. This will bring a great number of people into the terminal area, which is about 600 feet distant from Wheeling's property.

The Cleveland Terminals Building Company has felt justified in expending twelve million dollars in the erection on air rights of the Terminal Tower Building. In addition it has felt it proper to build the Medical Arts Building on air rights located on the southwest corner of Ontario Street and new Prospect Street within about 400 or 450 feet of the north end of Wheeling's property. That building is some eighteen stories high and is practically completed. Considerable space has already been rented to doctors and dentists. I understand that the rental price of the Medical Arts Building, as well as the Terminal Tower

Building, runs from $3.00 to $4.50 per square foot. The Terminal Tower Building is perhaps 75% to 80% occupied with office space. The building located on the north side of new Huron Road, west of the corner point of Ontario Street, known as the Builders Exchange Building, is also being built on air rights by The Cleveland Terminals Building Company. The first eight or nine stories of it are announced to be used for garage purposes, and above that the space is to be used for offices and offices have already been taken by the Builders Exchange and its members. This building is connected with the Medical Arts Building, and at the present time its steel work is erected and some of the curtain walls are in progress. It is directly across Huron Road from Wheeling's property.

Quite close to Wheeling's property within about 600 or 700 feet at the outside, and on the east side of Ontario Street, immediately south of the Public Square, is located Cleveland's largest department store, the May Company. It likewise has frontage on the Public Square and Euclid Avenue. From published statements the May Company in its four or five scattered stores does a business of from ninety to one hundred million dollars per annum, its Cleveland store doing a business of about twenty-five million dollars per annum. Adjoining the Cleveland store of the May Company and on the northeast corner of Prospect and Ontario Streets is The Bailey Company, the next largest department store in Cleveland, doing a business, as I understand according to the best available figures, of from twelve to thirteen million dollars a year.

Bonds have been sold for what is generally known as the Lorain-Central Viaduct, which will extend from a point near Lorain Avenue on the west side of Cleveland over the Cuyahoga Valley to Central Avenue on the east side, which is about 250 or 300 feet south of the south line of Wheeling's property at Eagle Avenue. The easterly approach of this Lorain-Central Viaduct is to be connected with an extension of Carnegie Avenue, the extension to be made westerly from East 22nd Street to the Viaduct. When Carnegie Avenue is connected with the Lorain-Central Viaduct it will bring into the Wheeling area or very close to it a greatly increased traffic. The new Huron Road as proposed and the new Prospect Avenue as proposed, the latter now open for traffic, will also bring into this territory or section a greatly increased traffic. Huron Road as proposed and Prospect Avenue as now open for traffic connect with the only present important passageway or artery

from the Public Square to the west, to-wit, the Superior High Level Bridge. They will contribute to center the traffic, vehicular as well as pedestrian, in the terminal area.

I made a minute examination of some 140 to 150 parcels of property in what is known as the terminal area, that is, south of Superior Avenue, east of Columbus Road and west of Ontario Street.

Referring now to Executive Committee's Exhibit No. 4, attached to Exhibit No. 48, and to the property of Wheeling shown in yellow on Exhibit No. 4, and based upon the investigation and study which I made and the elements and factors which I have taken into consideration as above enumerated, the fair and reasonable market value of Wheeling's property was, in my opinion, on the 3rd day of July, 1928, $7,500,000. Based on square feet values the 74,515.5 square feet in what is known as the building site area, I appraised at $92.14 per square foot. The remainder of the area shown thereon and designated as the right of way area, comprising 34,828 square feet, I appraised at $18.21 per square foot. This makes an appraisal of $6,865,812.00 for the larger parcel and $634,188.00 for the smaller parcel. My appraisal is based upon the assumption that Wheeling owns the fee of this property, the frontage of which on Ontario Street is 492.83 feet. I do not know of any property on the west side of Ontario Street, south of the Public Square, in one ownership, which had a frontage of 492 odd feet on Ontario Street, or which comprised the number of square feet comprised in Wheeling's property.

No cross examination.

H. D. Jouett, recalled as a witness by the intervener, The Pittsburgh & West Virginia Railway Company, testified as follows:

Direct Examination by Mr. Hoppe.

Witness produces sheet numbered No. 1-R, a plan of the work which Terminals desires to do upon Wheeling's property adjacent to Ontario Street, which was marked "Exhibit No. 106, Witness Jouett," identified, offered and received in evidence. A second sheet designated No. 1, showing the work Terminals desires to do upon Wheeling's property adjacent to Canal Road was marked "Exhibit No. 107, Witness Jouett," identified, offered and received in evidence.

The north line of Wheeling's property is not shown on Exhibit No. 106, being about 20 feet north of the center line of Huron Road proposed. The heavy white line along Ontario Street on Exhibit No. 106 indicates the wall construction below ground which will support the roof over the terminal tracks under Ontario Street, and is designed to carry the load of the street fill above it. The wall is entirely within the street. The white lines at the end of which is written "building line south 58 degrees 10 minutes 50 seconds east" is the building line as it will be after Ontario Street is widened on its southerly side, as contemplated by the ordinance governing the construction of the terminal. This building line starts substantially at a point where it and the retaining wall meet and then runs in a northwesterly direction to the southerly side of Huron Road proposed, thence along the southerly line of Huron Road proposed a short distance to where it crosses Huron Road; thence to the northerly side of Huron Road; thence westerly a short distance and thence northeasterly to where it meets a similar retaining wall upholding Ontario Street, following in the latter part the westerly or southerly line of Ontario Street.

The terminal tracks under Ontario Street are about 40 feet below the street surface. The entire street is dug out and what might be termed a concrete box is constructed therein, supported by a wall on the north side and by a pier on the south side and also by intermediate piers. On the southerly side of the street and above the box, the top of which is approximately 20 feet below the street surface as it existed and as it will exist, there is a retaining wall to hold the earth fill, which will be put in between the top of the box and the finished street surface. The four heavy white lines on Exhibit No. 106 indicate the retaining wall which is to be built on top of the box for the purpose of holding up the 20 feet of earth on top of which the street will be built.

The words "C. L. of Traction—Track A or base line", at the right hand corner of Exhibit No. 106 is the center line of Track A. Track B is not indicated on the sheet, but the distance between the center lines of Track A and Track B is 16 feet. Track C is a depressed subway track. The circles from place to place either side of Track C are holes left through the foundation of the walls for Track C for the purpose of sinking caissons through them if required in the future for construction over the tracks if desired. The only place where holes have been left is

through the foundations of the walls alongside of the depressed Track C. Tracks A and B will be out toward Ontario Street and underneath or north of the building line. Track D lies to the south of Track C and will lie entirely unenclosed as will likewise be Tracks E to I inclusive except to the extent that they are under Huron Road proposed. Those tracks being left in the open, there would be no reason to make provision for the development of air rights at the present time, and if it were decided to develop air rights at any time in the future, caissons could be built for the purpose of supporting the superstructure between the various tracks where there is a clearance to permit of placing columns on top of the caissons.

Exhibit No. 107 indicates the structure that is being placed over Canal Road as relocated and Canal Street for the purpose of supporting the tracks of Terminals, and no provision has been made there for the sinking of future caissons, the tracks being in the open. Through the Eagle Avenue viaduct are eight openings from Ontario Street down to Canal Road and Terminals will use the first four openings south or west of Ontario Street for its tracks. The fourth opening underneath the viaduct is on a line with the bridging built over Canal Road and if you draw a line from that bridging direct to the fourth opening under the Eagle Avenue viaduct, you will have the extent of the right of way property of Wheeling which will be utilized for railroad purposes by Terminals. The balance of Wheeling's property fronting on Canal Road and the Eagle Avenue bridge will not be used.

CROSS EXAMINATION by Mr. Martin.

Nine tracks are designed to run into the terminal over the area lying between the Eagle Avenue ramp and Huron Road. Tracks A, B, C, D, and to a slight extent E, will be located under Ontario Street. Tracks A, B, C, D, and E, and at another point tracks B, C, D, E, and F will be on Wheeling's property northerly of Eagle Avenue, not more than five tracks at any one point. Four of the nine tracks are located in whole or in part over Canal Road as relocated, namely, F, G, H, and I. The property of the Wheeling, owned and leased, northerly of Eagle Avenue and within the limits of Track A on one side and Track I on the other side, is only sufficient to accommodate five tracks having a normal clearance of 16 feet from center to center.

The tracks going across Wheeling's property will constitute the throat of the union terminal at its easterly

end. From a point east of Eagle Avenue, that is, easterly of Wheeling's property to about the angle in Canal Street opposite the Illuminating Company plant, there will be a series of cross-overs from one track to another of Terminals, and north or west of the same angle the tracks begin to fan out into the station track and platform area, so that because of these cross-overs and turn-outs it will be impossible to put columns between the tracks on account of lack of clearance between equipment and any columns so placed. This layout, therefore, limits to a very large extent the points at which it would be possible to put columns in between the track layout as contemplated. A further difficulty in connection with locating caissons is the physical difficulty in building them after the track layout is once put in because of the necessity of working in between the tracks at the most used part of the terminal. That is not only a physical difficulty but it is reflected in cost. There is also an objection from the standpoint of Terminals to the placing of columns in that congested territory as it is the hottest part of the layout, the place where there is more likelihood of derailment than any other spot in the terminal, and, therefore, dangerous to any columns so placed, and the placement of such columns would make it more difficult to rerail trains in case of a wreck. The bulk of the switching of the trains in the terminal will be done at the easterly end of same because of the level grade conditions, and as Mr. Schaff testified the other day, practically all through trains entering this station have more or less switching done upon them, and the trains that terminate in the station have to be switched from the station tracks into the coach shed. That means for every train that is handled in the station there are one or more switching movements on that equipment, and the bulk of it will go through this east approach, making it, therefore, the hottest point of the trackage in the station. Derailments are more likely to occur on switches and cross-overs than they are on tangent tracks or even curved tracks, and as this particular point is a nest of switches and turn-outs, I say it is the place where there is the most likelihood of derailment than any other place. The tracks at this point are confined in very narrow limits and even if caissons or columns or pillars were not placed there the clearing up of a derailment or wreck would be quite difficult, more so than if it happened on a portion of a railroad in the open country or farther out in the city.

The location of such pillars, columns or caissons would create difficulty from the standpoint of possible future ex-

pansion of the terminal as there is more likelihood of changes having to be made in the station throat than at any other places if the future develops that we have not put in the best arrangement of turn-outs and cross-overs. There is, therefore, more possibility of having to rearrange tracks at this point than elsewhere. If we had to rearrange tracks where the columns are, it would, of course, necessitate the reconstruction of the columns and their supports in order to make the track changes, which would be both difficult and expensive.

As to the holes referred to, it is good engineering practice to leave such holes for possible supports when the construction work on the walls is going forward, and it is also good engineering practice to provide a turn-out for a possible subway track at a level 20 feet below the steam layout while the work above is going forward, since it would be extremely expensive and difficult to do this work afterwards. To go into it at a later date and attempt to make a connection from Huron Road, for instance, into this terminal layout 60 feet below the level of Ontario Street and under the terminal tracks and construction 40 feet below Ontario Street would be almost impossible.

The Medical Arts Building has eighteen stories above the street level and one floor below the street level at the station level. I am familiar with the loads which the columns supporting this building must carry. If buildings of that character were to be erected over Wheeling's property with the tracks of Terminals crossing the same as described, it would from my experience be necessary to sink the columns or caissons 160 or 170 feet below the level of Ontario Street, which would be about 80 feet below river level. This would be necessary to strike material capable of supporting the loads that would be imposed on those caissons, since there is not the proper kind of material, soil or rock, to carry such loads until you have gone down that distance below the street. Such caissons are difficult of construction and expensive, and while such depths are used it is somewhat unusual.

If a structure of the character of the Medical Arts Building were constructed over the Terminal tracks on the Wheeling property, it would be necessary to support it on bridging which would be carried by columns between the tracks, those columns in turn being supported by caissons below the tracks. If the tracks were not there the columns could be spaced as desired, but when a building is erected over railroad tracks or the throat of a railroad station, you

are necessarily limited by the points at which you can place columns and still leave clearance for your tracks without crippling your station facilities. Where, in this case, you attempt to put columns over a throat where there is a series of tracks and cross-overs, the spaces where you can put in columns is very limited, and, therefore, you have to put the columns where you could; on top of those columns put girders, which we call distributing girders, and then in turn pick up on those distributing girders the normal column spacing required for the building. In this case you would have column spacing in places running up to 80 to 100 feet apart. You would have girders of 80 or 100 feet to support the columns of the building above the normal spacing which would probably run from 15 to 20 feet apart. That would involve cost and difficulty, for with columns spaced at such distances and the girder carrying three or four columns of the building above you would get excessive loads on those columns put in between the tracks. We have something of the same situation in the Medical Arts Building, and we actually get under the Medical Arts Building caissons for an 18 story building that are bigger than the caissons we get under the Terminal Tower Building, which is a 52 story building, because of the spans and loads in the former. Such bridging running 80 to 100 feet in length is very unusual and would in itself require greater size of caissons than are found even in a building which is so supported, since the load on each caisson would be greater because it would be carrying the load of three or four columns instead of one.

RE-DIRECT EXAMINATION by Mr. Hoppe.

The spacing of the caissons in the Medical Arts Building varies materially with a maximum of 70 feet apart, with three tracks running between. The caissons are sunk about 170 feet below Ontario Street level. The maximum bridge span between caissons is 70 feet.

[Referring to Exhibit No. 35, particularly to that part of the Wheeling property fronting on Eagle Avenue, there are four steam tracks crossing Eagle Avenue on this plan indicated by the letters F, G, H and I. There are nine cross-overs north of Eagle Avenue up to Canal Street, the distance being approximately 600 feet. The distance between the tracks "D" and "F" is 32 feet. While track "E" is shown on Exhibit No. 35 as joining track "D" at a point somewhat north of Eagle Avenue, this exhibit does not show the track layout as it may finally be put in as that depends on traffic. Track "A" joins track "C" a little bit

east of the right hand turn in Canal Road and track "B" likewise converges with track "C" at about the same point. The space between the traction tracks and steam tracks at the point in the bend of Canal Road is 16 feet and widens out between that point and a point about 300 feet easterly until it becomes 32 feet. In answers on cross examination to questions about Wheeling's property and the tracks thereon I referred to Wheeling's property which it now owns and have no reference to the tentative agreement calling for an exchange of properties between Terminals and Wheeling arising out of vacated areas as outlined in yellow on Executive Committee Exhibit No. 4 of Exhibit No. 48. If this additional property were considered the situation would be approximately the same as the worst condition comes on the property which Wheeling now owns, all the way from the present north line of Wheeling's property down through the narrow part to Eagle Avenue. The space between track "C" and the north line of easement is vacant at present, and north to Ontario Street. The easterly line of the property shown in yellow on Executive Committee Exhibit No. 4 of Exhibit No. 48 is 410 feet westerly of Eagle Avenue measured along the Ontario Street line. The space between the north line of easement as shown on Exhibit No. 35 and the Ontario Street line at that point scales 30 feet. It runs out to zero 230 feet westerly thereof measured along the Ontario Street line. If you carry the line beyond the north line of easement down to the center line of track "F" it is 110 feet.]

RE-CROSS EXAMINATION by Mr. Martin.

Some of the minimum spans underneath the Medical Arts Building are as low as 16 feet. The maximum span for a similar building erected over the Wheeling property north of Eagle Avenue would be from 80 to 100 feet and the minimum spans would be 16 feet. That would be determined by the clearance between the tracks. There will be a large number of steam and traction passengers using the terminal and moving over these tracks to and from the east, all of which will have a direct bearing on the necessity for maintaining safety, proper clearance and proper protection for trains, and there are greater difficulties in the matter of securing these if air rights are utilized over Wheeling's property than existed in the case of the Medical Arts Building because there are only a few cross-overs or turn-outs beneath the Medical Arts Building. I stated that there were nine cross-overs, as shown on Exhibit No. 35, on

Wheeling's property north of Eagle Avenue and there will also be four turn-outs. These are for the initial track layout and there will be additional ones for the final track layout. The initial track layout shows at Eagle Avenue two traction tracks and four steam tracks. In the angle at Canal Street and Canal Road opposite the Wheeling property it shows four traction tracks and five steam tracks. The final plan shows at Eagle Avenue four traction and five steam tracks and at the angle in Canal Road and Canal Street opposite Wheeling's property it shows four traction tracks and five steam tracks. When new tracks are added we must add new cross-overs or turn-outs, so we would have altogether eleven cross-overs and four turn-outs in the steam tracks. The cross-overs and turn-outs in the traction tracks in the initial layout will be eliminated in the final layout.

The contract between Terminals and the Terminals Building Company provides for an easement for Terminals to accommodate both steam tracks and traction tracks on the easterly approach, which runs, in part, across the property owned or leased by Wheeling northerly of Eagle Avenue. My answers to questions on cross examination related to the lands which the Wheeling now owns and now leases northerly of Eagle Avenue. These are shown on Map 1 of Exhibit 48, the owned lands being in yellow, the leased lands being outlined in brown. The lands shown in yellow on Map No. 1 of Exhibit No. 48 correctly represent the lands known as Fee Lands in the option agreement Exhibit No. 11, being parcels 1 to 10 inclusive, and the parcel outlined in brown on Map No. 1, Exhibit No. 48, correctly portrays the lands described in Exhibit No. 11 as leased lands. The reversionary lands, rights in streets, are not indicated upon Map No. 1 of Exhibit No. 48.

Adjournment.

May 16, 1929.

CHARLES L. BRADLEY, called as a witness on behalf of the intervener, The Pittsburgh & West Virginia Railway Company, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Taplin.

I have been President of the Cleveland Union Terminals Company since August 1927. I am thoroughly familiar with the operations of that company since I took hold as

President, and I know in a general way what has transpired in connection with the terminal development. I have been interested in real estate for a good many years in Cleveland, but I do not consider myself a real estate expert, nor am I thoroughly familiar with real estate values there. If I were, and as I know values, I don't think I would be buying any property. Most of the real estate values in Cleveland that I have had anything to do with lately have been too high, I think, my remarks being directed to all the real estate I have known about lately which Terminals has had to acquire in connection with its development. I never made any inquiry to find out what the values of real estate around the Public Square and Ontario Street was two years ago, when I took office with the Cleveland Union Terminals Company. I am not certain that the terminal development, since I took hold of it two years ago, has yet had any effect upon values in its neighborhood, and I am not certain that it has not. I think the known development of Terminals ought to improve values in that neighborhood ultimately, that is, in time after it gets into operation and develops that territory and gets old buildings out of the way and new investments placed on the properties in order to make new values. Practically all of the buildings should be taken out of the section including the east side of Ontario Street from the square as far as you could earn on. I do not know how far that would be. In the other direction the prospect is certainly not so good.

As to the present state of development of what you might call the supplemental structures of the terminal, the Terminal Tower Building is complete and there is in course of construction another building, known as the Medical Arts and Builders' Exchange Building. Anything adjacent to the Terminal Tower Building will not be a part of that building, but will be a different building, for example, on the now vacant plot of ground on the southwest corner of the Square and Ontario Street, between the easterly side of the Terminal Tower Building and the northerly side of the Medical Arts Building. There are no settled plans for the development that will be placed upon that corner, but we are hopeful that that site will be used for a large department store but thus far our hopes have not materialized. I do not know exactly to what extent the Terminal Tower Building is occupied. I think the office floors above the ground level are somewhere in the neighborhood of 88 per cent occupied as to space, but I do not know to what extent as to rental values. I do not know the square-

foot rental values of the Terminal Tower Building, nor do I know that anybody in the hearing room does. I have an idea that they range from about $2.30 to $4.50 a square foot. I should think the Medical Arts Building is about 70 per cent completed and will be ready for occupancy about the first of September. I think around 30 per cent of the space in that building has already been contracted for occupation. Immediately adjoining the Medical Arts Building is a so-called Garage and Builders' Exchange Building, the two being constructed as one building. The garage in the latter building has been leased on a sort of partnership basis with a Mr. Killeen, in whom we have confidence. The garage takes up nine floors of that section, and what would be the basement is the platform of the station area. I think there are nine more floors in the Garage and Builders' Exchange Building and that they have been rented to a very slight extent. The Builders' Exchange of Cleveland, for which the building has been named, has taken less than one floor, and practically none of the balance of the building has been rented as yet. There are eighteen floors in the Medical Arts Building.

The Midland Bank Building has been projected in connection with the Terminal group, to be placed there (indicating on blueprint, Exhibit No. 38), bounded by Prospect on the north, B Street on the west and Huron on the south, and on the east by the Medical Arts and Builders' Exchange Building. No provision as yet has been made for building on the northwest corner of Ontario and Huron Road extended, nor have any plans been definitely arrived at, nor is anything in prospect. As to other developments that have been planned for this station area, an addition to the Hotel Cleveland has been discussed, with the idea that some time in the future that will probably take place. There has been some talk of a building for the New York Central Railroad, but whether there is anything but talk to that, we don't know. There has been no talk of one for the Nickel Plate. There has been some talk of a post office but I am not clear in my mind whether that is going in the Central Building or whether the idea is to have it in a separate building. As to some plans having been submitted to Congress or to the officials at Washington looking to the acquisition of a site in the terminal area for a post office, I don't know where that stands at the present time and I would not say that such representations had or had not been made to Washington interests. There was some talk about the proposed post office going in the location bounded on the north by Prospect, on the east by C Street and on the south by Huron and

running over to a depth of approximately 100 or 120 feet westerly, that is, with a frontage of about 100 or 120 feet on Prospect and Huron Road. If that site were used, it would have to be acquired from the Terminals Company and not from the Building Company. If any representations had been made to anybody for the acquisition of that site, I, as President of Terminals would have knowledge of it if it got to a point where it was serious, and it would have to go up to our Directors, as a proposition for submission to the government, but I am very sure that there has been no proposition made and no firm offer. Some suggestion has been made that it could be acquired upon some basis, but no basis stated. I understood there was a bill presented to Congress, at a certain number of dollars, for post office purposes in Cleveland but that no representations were made regarding the site, even indefinitely, in the terminal area.

At first it was discussed that the New York Central Building would be over the post office, in the location which I have already described as the post office site. There has been some talk lately of a development of the area just east of the post office site, bounded on the south by Huron, on the west by C Street and on the north by Prospect, approximately 100 feet wide upon Prospect. There has been no definite arrangement about the erection of the New York Central Building. There are no other developments projected for this terminal area.

I know the location of the Wheeling station on Ontario Street and its relationship to the terminal area. That property would have a corner frontage on Ontario Street and Huron Road diagonally opposite this unoccupied corner which is adjacent to the Medical Arts Building, so that across the street and to the west of the Wheeling corner would be a vacant corner, then to the west of that a garage building. The Medical Arts Building does not face at all on Huron, just on Ontario and Prospect.

The plans of the terminal provide for traction as well as so-called steam roads, and the plan of Terminals is to bring steam and rapid transit lines into the station, but there is no plan for bringing any city traction lines in. I would not say that the terminal development is not made in a way to afford entrance into the station of the city traction lines; if a lot of work is done, they can get in, and in one place there has been some work put in that would take care of possibly something besides rapid transit, but it was not put in for the purpose of taking care of

anything but rapid transit. I refer to the Huron Road tunnel. I know that for a great many years there has been discussion of utilizing the area under the Public Square for subways for city lines, and in this terminal development the Public Square proposed subway area can be connected with the Union Terminals. We have built it with the idea that, if anything like that happens, it can be done, and in the hope that it would happen. My understanding is that I am not connected in any way with the Municipal Tractions, Inc., recently incorporated, or The Metropolitan Utilities, Inc., recently incorporated, but I would not necessarily know if I were. As to whether there has been pending in Cleveland for some time a proposed deal between the Terminal interests and the interests operating the city traction lines for bringing those lines into the new Union Station, I will answer that by saying that there has been a plan proposed for the coordination of the rapid transit and Cleveland surface lines, but no plans have been made in the direction of bringing the city street cars into the Cleveland Union Terminals. We don't know now that the general plan is to bring them in; we would like to have them in. Bringing them in would be bringing a lot of people into the station area and would very greatly increase the number the steam roads would bring in and the number of people passing through the new Union Station every day, and I think it proper to assume that the rental value and desirability of the concession area which is leased by the Cleveland Traction Terminals Company from the Cleveland Union Terminals Company would be improved by more people. I don't know whether or not Terminals is interested in bringing as many people into that station as possible, certainly not to the point of congestion there. I don't think any congestion in the near future is anticipated, and we have provided very liberally in space for large numbers to go through the station, but I do not know what that space is estimated to handle per day in the way of traffic.

Density of traffic I suppose helps the value of business property, so that I think, so far as the Terminals is concerned, the denser the traffic the more beneficial effect it will have on values of the Terminal property and on the immediately adjacent property. The occupants of these various buildings projected for the terminal area have access to the Terminal station without going out of doors and provisions have been made for a number of bridges to be put over Prospect and Huron Road extended, in order

to afford passage from one part of the terminal area and the buildings therein to any other part of that area and the buildings located thereon, so that as far as possible any particular development of the terminal area is connected with all other parts, without going outside. It has been planned to advertise that as one of the great advantages of locating in the terminal area. I do not know of any reason why a structure erected upon the Wheeling property could not equally well be connected with the terminal development so that people would not have to go out of doors in order to go back and forth between any such building erected on the Wheeling property and the new station and the buildings connected therewith; we have never studied it with that in view. The erection of this terminal and associated buildings and the resulting numbers of people that will be brought down to this focal point at the Square will help the value of business property in this neighborhood. It will have to help in order for us to substantiate anything we have done for it.

I know of a publication in Cleveland called "The Clevelander", put out by the Chamber of Commerce, but not to my knowledge have I at times written articles for that paper. My name is attached to the article (indicated) in the issue of this paper dated March, 1928, but I did not write it. I do not often let articles go out over my name as President of the Cleveland Union Terminals Company, and in this case may have read it, but I was approached by some one, I have forgotten whom, and felt I had to permit the use of my name to the article. I ought to subscribe to the statements contained in it but don't know as I do. Looking at page 4, I think the picture at the bottom of the page is the southwest corner of the Square and Ontario. I think the stores located in that building (indicating) look like Humphrey's pop corn stand and a drug store, and next was the Kendall seed store, a separate store on Ontario Street. This building on the corner was pretty old construction and I think had been there ever since I remember anything about Cleveland, and I remember its condition when it was torn down a few years ago, before I took hold of the Terminals, at the request, I suppose of Terminals who had acquired the property. I would think the Tower Building comes up approximately to the building across which is the large sign "Webster Cigars". I think there was a perfectly good saloon in one of these buildings along here (indicating) running toward the corner of the Square where the Tower is located, and I think

King's harness shop was on the corner and ran through to Champlain Street. The buildings which faced on the Square were all little, ramshackle buildings.

The article by Mr. Bradley was marked "Intervener's Exhibit No. 108, Witness Bradley", offered and received in evidence.

CROSS EXAMINATION by Mr. Boyd.

The area which is to be occupied by the Midland Bank will be Cleveland Terminals Building Company area. It was originally Terminals Company area, but there has been some discussion and tentative figures worked out for a sale of that property to the Building Company. I don't think that sale has been completed yet. The floor under the Medical Arts Building is the floor of Terminals. My recollection is that the provisions being made for bridges to connect proposed buildings across Prospect Avenue include both Prospect and Huron. There are certain limits in the recent ordinance but I do not know just what they are, nor the points where the bridge will cross.

RE-DIRECT EXAMINATION by Mr. Taplin.

I am a Director of the recently reorganized Midland Bank. I was the moving spirit in effecting the reorganization of that bank but I did not have anything to do with getting it to locate in the Terminal area, and as President of both Terminals and The Terminals Building Company I would not on purpose have any part in the discussion as to the sale or exchange of air rights. As to the reason for exchanging the title to the air rights upon which the Midland Bank Building is to be erected, from the Terminals Company to the Building Company, the only one I know is that those who own this terminal area felt that, if they could sell some air rights, they were willing to do so. The Midland Bank did not want to buy them. It is planned that the Building Company will construct the Midland Bank Building and then rent the space to the bank, and since the definite location and general plans of the bank have been announced, I think they have definitely agreed upon a basis and that it is just a matter of getting it cleaned up. Before any work starts, it will be cleaned up, of course. I think work will start within the next two or three months, but so far as I know no contracts have as yet been let. The contract for the construction of the combined building of the Medical Arts, the garage and the Builders' Exchange was let to the low bidder, the Lundoff-Bicknell Company, the

price being somewhere in the neighborhood of $6,000,000. I think the cost of the Terminal Tower Building was in the neighborhood of $12,000,000. I do not know yet the estimated cost of the Midland Bank Building; I would think it would run around $3,000,000.

Intervener, The Pittsburgh & West Virginia Railway Company, rests.

JOSHUA D'ESPOSITO, called as a witness in rebuttal on behalf of the intervener, The Cleveland Union Terminals Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I have lived in Chicago since 1914 and have followed my profession of civil engineer for 27 or 28 years. I received my practical training in the office of the Westinghouse Electric Company, followed by employment with the Pittsburgh Railway Company, followed by employment from 1904 on with the Pennsylvania Railroad Lines west of Pittsburgh, in the office of the Chief Engineer of the road, and later on as assistant to the Chief Engineer of the Pittsburgh Union Station, and in 1919 was appointed Chief Engineer of the Chicago Union Station Company, in which capacity I acted up to and including the month of March, 1927. During my employment with the Pennsylvania Railroad Company, and in 1906, I was made chief draftsman and engineer in charge of the office of the Chief Engineer of the Pennsylvania Lines west of Pittsburgh, and under my direction were prepared plans of all work and structures and improvements that were carried out on the entire Pennsylvania Lines west of Pittsburgh, Northwest System, from 1906 until 1913, when I took more direct charge of the Chicago improvements only. The work covered a large variety of undertakings, consisting of plans for track elevation, freight terminals and passenger terminals and harbor improvements at the various lake ports, and so forth. I never actually left the employment of the Pennsylvania Railroad Company. I was given leave of absence. Assuming that there was a time when I was detached from actual employment with the Pennsylvania Lines west of Pittsburgh, that time took place in 1914.

Up to 1914, I made many plans and studies for a lake front terminal in Cleveland. I made plans and studies for a terminal at Fort Wayne, Ind. I made studies and plans for a station at Canton, Ohio. I actually designed the sta-

tion and terminal of the Pennsylvania in Allegheny, just outside of Pittsburgh, and a large number of small stations which do not come to my mind at the present moment. About 1910, when it became evident that the Chicago work was going to be undertaken, I was in a measure detached from most of the other work and was actually put in charge of the direct preparation of all studies, negotiations and the preparation of necessary ordinances and legislation required to carry out the Chicago Union Station work. For this purpose I was directed to make studies of all passenger terminal improvement work throughout the country, in fact covering many of the terminals throughout the civilized world, and to that effect I collected a large amount of information, which was classified and studied for over two years previous, in order to fit myself so that I could do justice to this terminal development in Chicago, with the result that, while I was detached in 1914, my actual connection with the Chicago work in a serious manner began about 1909 or 1910.

In 1913 I was sent to Chicago as engineering adviser to the Committee of Railroad Presidents who were undertaking at that time the preliminary negotiations with the City of Chicago to bring about the passage of various ordinances covering this improvement. I acted as engineering assistant and adviser to this Committee for practically one year. Then in March, 1914, the ordinances were passed and I was appointed engineer in charge of construction immediately.

I am referring to the Chicago Union Station, the major building—what we call the head house—which is located between Canal Street, Jackson Boulevard, Clinton Street and Adams Street. The layout and all the facilities cover the territory between Canal Street and the Chicago River from 12th Street to Kinzie Street and all the structures involved therein. That depot was completed and opened to traffic and to the public in August, 1925. The work was started in 1915. Then the war came and hardly anything had been done, and during the war I was in the service of the Shipping Board. Following the war I was appointed Chief Engineer in 1919, at which time we resumed operations and the work was carried to completion under my direction, up to 1925. At the completion of the Terminal, the General Manager was appointed and he acted as such for a few months, and upon his being made president of the Chicago Great Western Railroad I was requested to assume the duties of General Manager, which I did, acting

as Chief Engineer and General Manager for 16 months and operating the station which I had completed, to April, 1927. Since 1927 I have been in business for myself, as consulting engineer.

During my development and planning and building of that station, and during the period of my operation of it, I had occasion to observe, in connection with the Union Depot approach facilities, the development of air rights for building development purposes. I made a study of that question in connection with a definite problem which arose in 1925. At that time the Chicago Union Station Company was approached by certain parties with a proposition to acquire air rights in the block between Madison Street, Canal Street, Washington Street and the Chicago River. At this point the tracks coming into the station from the north spread out, fan out, and branch into the system of parallel tracks into the station. On account of the fact that this property is fronted on the west by the new Chicago & Northwestern Station, and we were offered inducements which we felt it wise to consider, I had to study the possibility of erecting a building on this complicated and vital section of our improvement. I did not make the statement it was a vital section from the standpoint of air rights. I meant to say that it was a vital section from the point of view of the operation of the terminal, as it is occupied by a crossover system of the tracks leading into the station tracks and it is at this point that movements are controlled so as to give you the maximum or a near maximum or an inferior operating condition in the station area.

From my study and investigation of the availability of air rights space for building development at or about such vital point in a terminal area, my conclusions are that over the approach or the throat of a terminal the possibilities of developing air rights and utilizing the space by means of placing supports between the tracks are greatly limited and, in many cases, they are absolutely non-existent because of the fact that the railroad requirement may compel a readjustment of the facility at this very critical point in order to meet operating conditions which cannot be foreseen at the time when the facility is planned.

I had charge of the negotiations which led to the acquisition of the right to build the Chicago News Building close to the new Union Station in Chicago, and, furthermore, I acted as engineer for both the buyer and the seller and I am yet, so that I represent all the parties in the transaction. The Chicago Daily News development occupies the

spot which I have referred to in the previous remarks where we had negotiations before. The difficulties encountered were that we imposed on the Chicago Daily News the obligation of spanning the entire throat of the station without any columns, which resulted in trusses 102 feet long and in an extraordinary expenditure for steel work and in a complex building at the low level which very much militates against proper use and development of the space created. The condition was imposed on the Daily News that the tracks already existing of the Chicago Union Station Company should not be interfered with, removed or relocated or anything put in the way so that they could not be readjusted in case the demands of the traffic required such adjustment. Those requirements imposed added cost in developing the air rights and building over it, and on this particular building it was estimated by the buyer that he would spend one half million dollars in steel work alone in excess of what he would have spent had he put up a building on an ordinary piece of ground. The actual results are somewhat in excess of that estimate, I think. As to what extent the News Building as constructed covers the tracks either of the depot area or of the throat to the depot or its approaches, the total area of the lot is approximately 100,000 square feet. The News Building itself covers 40,000 square feet of this area, the remainder being covered by a plaza and by entrances and passageways and by a low section of a building which is used by the printing company for newspaper delivery and a driveway, so that the actual building, 25 stories high, only occupies 40,000 square feet of this 100,000 square feet of space.

I know all about the financial conditions and arrangements and cost that entered into the transaction whereby the Chicago News was given the right to build over a portion of the Union Depot's tracks or approaches in Chicago. The Chicago Union Depot is operated with steam motive power, and the Chicago Daily News had to assume the obligation of creating smoke and gas exhaust devices and apparatus satisfactory to the Union Station Company so that operating conditions underneath the whole area would be satisfactory and usable. The Marshall Field & Company air rights development is a separate air right development over the property of the Chicago & Northwestern Railroad. I studied the circumstances under which that development was created and carried forward and completed, but I do not know about it by direct contact. I am

retained at the present time by the Chicago Union Station Company, one of my duties being that of investigating the possibilities of developing air rights over their entire property, and I am actually engaged at the present time in making such studies but they are nothing more than studies of what might be done on the properties owned by the Chicago Union Station Company. I have studied the Pennsylvania Station in New York in connection with the development of the Chicago Station. The United States Post Office Building is strictly an air right proposition, north of the head house of the Pennsylvania Station, but if you compare the space surrounding the Pennsylvania Station with the development that has taken place around the Grand Central Station, I think it proper to say that the air rights surrounding the Pennsylvania Station are "undeveloped." My opinion is that the developing of space over the station tracks is such a costly enterprise that it would be more economical to acquire free land on both sides of the streets where you are not encumbered or interfered with by your railroad facilities, and utilize such space for any building any investor may have in mind. When the Grand Central in New York was built and the development took place around 42nd Street, they were dealing in a territory of more expensive or more valuable real estate values and it very quickly became possible to absorb the additional cost of foundations and steel work and develop such air rights as they have developed.

My studies indicate that the development of an air right property assumes the burden or is penalized to the extent of approximately 25 dollars per square foot before use can be made of the property above the track area. The additional cost of foundation, the additional cost of steel work, the loss of basement and subbasement space, which must be made up by devoting space in the upper levels, which space naturally would be rented out as ordinary space—all of these things combined I estimate impose a burden ranging as high as $25 per square foot. By this I mean that as between the person or corporation attempting to build upon and develop air rights as compared with an adjoining person or corporation attempting to build upon free land, there is a penalty imposed against the developer of the air rights of $25 a square foot to put him or let him start on an equality with the developer of the adjacent free land, with this exception, that the $25 per square foot is not a constant. That is a figure which would apply under a normal set of conditions and may be modified

by peculiar conditions so that it may be higher and may be lower.

The Chicago Daily News development has river frontage and that was one of the controlling factors which influenced the Chicago Daily News in purchasing that particular site because they secure by that river frontage a possibility of unloading rolls of paper from a boat and on the other side they have a siding which permits them to unload paper from the railroad, so that they get double service from the river and from the lakes and from the railroad. The Marshall Field Air Rights Development has the same privilege. In addition to the two just mentioned, there is the possibility of developing air rights over a large amount of ground owned by the Chicago & Northwestern Railroad; there is a possibility of developing air rights over railroad lands south of Van Buren Street running into perhaps 60 acres; there is a possibility of developing air rights over the lands of the Illinois Central Railroad north of Randolph Street and east of Michigan Boulevard; but none of these has yet been taken advantage of.

Coming to the Cleveland situation, I know Mr. Jouett and I have examined all of the plans for the proposed Cleveland Union Terminals Depot development and all the approaches thereto, and I have examined and made a study of and understand all the plans relating to that development which have been offered in evidence in this proceeding. I have gone over the ground and have made an application of the plans themselves to the land covered by them.

Terminals' plan "D-I" in substitution for plan "D" accompanying Exhibit No. 1, illustrating the final track layout from Columbus Road to Central Avenue, Cleveland Passenger Terminal, December 14, 1926, was marked "Intervener's Exhibit No. 109, Witness D'Esposito," offered and received in evidence.

As to the obstacles and difficulties, and their extent, that would be encountered by any attempt to utilize the air rights over the property of the Wheeling as indicated on Exhibit No. 109, assuming that that property had the subgrade and is to be utilized as and for the east approach to the Union Terminals as shown by this exhibit, from the standpoint of the requirements of the terminal as an operating entity I would feel that I should preserve the integrity of this track layout at least from the east line of Canal Street where they intersect the track up to a point not less than 200 feet from the north line of Canal Street at the point measured going west, from the intersection of this line with the first station track. The system of tracks between those

two points is so complex and the movements that they control are of such importance in the station that I would not feel I would be doing my duty to the terminal if I permitted anything to be erected within this limit that would prevent me at any time from going in there and freely moving and changing anything that has been built at this point. As to the reasons for this conclusion, in the first place, I would like to make the point that there are movements in here (indicating) which control as many as five or six tracks in the station. In other words, if anything happens or if anything goes wrong at some critical point in here, a large section of the entire station area will be affected and will be put out of commission so that from my point of view the importance of this area is such a large proportion of the total investment in the station that I would not sacrifice this investment by any reasonable amount of revenue that I could secure from a development which would, in a measure, reduce that usefulness.

As to my reasons from the standpoint of either inconvenience or dangers attendant upon the operation of trains into and out of the terminal, I refer to the case of the St. Louis Union Station where, after the station had been in operation a number of years it was found necessary to tear out the entire throat of the station and to rebuild it in its entirety because it was not found to meet the actual requirements of the operating conditions as they grew and developed. In the case of my own station, after we started operating the Chicago Union Station we found that a certain class of engines going out of the station from the north would derail over our track layout every time they backed up, and we were confronted with the possibility of having to take out the entire north approach of the station to accommodate these engines. Fortunately, after making a study of the situation we found a way of solving the problem without having to scrap this track layout. Had we not found that method, that solution, we would have had to make the radical change involved in taking out the entire throat of the station at the north end because the operating railroad there made that demand, and it is for that reason that I have this deep conviction that the throat of the terminals where hundreds of millions of dollars are invested should be held sacred and not interfered with by anything that you can possibly avoid putting in there.

Pillars placed in the throat of this particular terminal would give you a rigidity in your facilities, which could not be overcome or avoided except at a very great cost. By "rigidity" I mean that you cannot shift anything. The

thing becomes of cast iron. The entire track facility, with the structure on top of it, is a cast iron structure. After you get these things fixed, you cannot move it unless you assume an enormous burden and, naturally, what happens is that neither of the parties involved will assume the burden and the service deteriorates. That is the normal result when you get those rigid things limiting the freedom of your operation. Assuming the plans are proper and perfect, several things may happen to require changes which the rigidity of the structure with pillars in there would interfere with or prevent. We do not know what the design of future locomotives may be. They do not design locomotives to fit our conditions. We builders of terminals and structures involved in railroad operations meet this problem every day. We cannot control the development of heavier and longer and bulkier equipment right along. We must meet it by changing our fixed facilities. We must change track layouts, rebuild bridges, and raise the dickens all around, sometimes. I speak from experience. I know just what I am talking about.

A track layout that is required in the throat of a terminal development as suitable for engines of a certain length is not necessarily suitable for engines of any other length. For instance, all other equipment operating in the Chicago Station would go in and back out without any trouble, but the class 6,000 of the Milwaukee Railroad engines would not go in and back out without jumping off on the back movement. That was only this class 6,000 special locomotive. As to the switch points which the beginning of operation might show would have to be changed to another size or number, I will state this, that he has some No. 8 turnouts which I am afraid on curves are going to be pretty severe when he comes to operate that station. If I am right about that and Mr. Jouett is wrong, what would have to be done becomes a large order. You may require more space. You may require a track that will start from this point now and you will have to start 50 feet back and thereby encroach on something in the way, and you may not be able to start 50 feet back. That is where the trouble comes in. If any such mistake were made, it involves changes which may turn out to be very serious, and a rigid structure supported by rigid pillars between the tracks would interfere with the opportunity to make the necessary changes.

From the plans, all the switching movements going on pass over this section of tracks which pass over the Wheeling. If after putting the terminal into operation it was found the turnouts were too sharp, it would have to be

changed to a turnout with a flatter angle, which would require more length than is provided for in the layout before me now, and it would be necessary to relocate every one of these crossovers that are indicated on this plan, in a different location, which I cannot foresee at the present time. Any plan adopted might have to be changed after it is put into operation as our plan had to be changed going north out of our depot in Chicago.

As to whether or not any elevation of the Wheeling land can in the future be used consistently with its use at a lower level for the approach to the terminal, my answer is that, when the abnormal cost of building a structure over the property, that would safeguard the integrity of the track layout, could be absorbed in the project, then and then only would the development above be justified. If and whenever the air elevations are to be utilized for erecting and maintaining a building or buildings, I would say emphatically that I would advise my client that the entire track layout which constitutes the throat or the immediate approach to the station area must be spanned by the necessary steel girders carried clear over such tracks. The length of such girders in order to give sufficient span so as to construct and operate the east approach as planned would vary from 80 to possibly 150 or 160 feet. From the standpoint of practicability it is simply a question of cost. We can do anything within physical limits. We could design a building within the clearances given these spans and carry it safely. From an economical standpoint a structure that would involve such costly elements would be very undesirable and unsuitable to the location that we are now considering. My estimate is that it would cost approximately $20 per square foot in addition to a normal development to produce this special support.

The difficulties and sources of danger in attempting to operate the throat of a terminal development under certain conditions do not attend upon the development of an area over the terminal area proper. The difficulties and dangers when you get in the zone of parallel tracks or tracks of slight curvature are very much limited. It is evident when you get in the zone of parallel tracks you can put in parallel supports, create parallel supports for buildings at reasonable spans, the spans being normally the distance, center to center, of the platforms. These platforms, even if you do not have a building on top of the space covered, would carry a train shed of some type, and the columns of the train shed, while they might be smaller than the columns carrying the buildings, normally are spaced about the same

distance, so, instead of having a train shed, if you had free ground, you would have the building column space located about the same, so there is no difference from that standpoint. From the standpoint of danger, if there is a derailment on parallel tracks you only affect one track, normally, or you may affect two tracks, but you do not affect seven or eight tracks or more as you would if the derailment occurred at a very critical point in the throat of the station, so the limitations for development in the zone of parallel tracks, station tracks with the platforms, or tracks with a very small curvature are infinitesimally smaller than they are when you get a building over the throat of the station. There would not be any columns for train sheds, nor train sheds nor platforms at the throat of this terminal development, and to that extent the situation would be entirely different from the situation within the station area proper. The tracks of this particular terminal in the terminal area are either parallel or have but a slight curvature, and it is over that station area proper where these conditions exist that air right developments have already been made.

Cross Examination by Mr. Taplin.

The depot previously mentioned by me as having been constructed at Allegheny, Pa., is partly a terminal station. At the time when it was built it was a terminal station and a through station combined. The Pennsylvania runs right through that station at the upper level and at the lower level there are sub-tracks which make it the terminal station for the service which is confined to the suburban group of villages and developments running west from Allegheny, along the Pennsylvania. That station is, of course, in no sense comparable with the Chicago Union Station nor the Cleveland Union Station here. The Chicago Union Station is operated entirely by steam, that is, steam locomotives run in there. In the development of the Chicago News Building the News Company was obligated to exhaust the steam and smoke, the extra cost by virtue of having to take care of that being estimated between five hundred and seven hundred thousand dollars. It is a difficult figure to arrive at because it is composed of many elements that are difficult to separate from the entire structure. The figure I have given is the additional cost of making provision for and operating the exhaust system. The additional cost of half a million dollars imposed upon the Chicago News Company, referred to in direct examination, included the excess cost of structural steel and additional foundations which

resulted from the fact that it was impossible to carry through columns of the building as they came down to carry the load directly to the ground. We had long spans where we could not put columns. We had to provide long trusses and take the load where they came. The cost of exhausting the smoke and steam was in addition to that figure.

I have never had anything to do with the construction of a large terminal that was electrically operated, but I know from general observation the advantages or disadvantages in operating electrically over steam. The major advantage in my estimation is the elimination of all smoke and steam from the area where the operation takes place; the probable more rapid operation of trains and more rapid switching that takes place due to electric operation, on account of the greater acceleration of electric equipment, makes electric operation somewhat cheaper, when everything else is taken into consideration, than steam operation. I could not tell you the comparative cost of operating electric locomotives and steam locomotives; I have not studied and compared the two systems to the extent that I would express that opinion today, and the economy of which I spoke in operating electrically over steam is based upon opinions that I have read and received from other people.

In connection with the development of their rights over the Chicago Union Station, the Chicago News Company acquired the fee to a piece of ground 100 feet wide and approximately 400 feet in length, lying contiguous to and adjacent to the east line of Canal Street and extending from Madison Street to Washington Street. They also leased the remainder of the land from this 100 foot strip to the river at a compensation which starts at $45,000 a year for the first 15 years, I believe, and increases at stated periods, which periods and terms I do not remember. The area of the leased property was in the neighborhood of 60,000 square feet, plus or minus and was somewhat irregular in shape, about 140 by 400, something like that; it may be 60, 160 or 140; those figures do not stick in my mind but they are immaterial. But it is a continuous piece from the river, contiguous to the 100 feet. This 100 feet fronts on Washington Street; the long dimension is on Canal Street; and it was purchased in fee for $1,200,000. The railroad was granted the right to operate perpetually under a triangular portion of that property, so that that is an encumbrance that runs with the land forever. The railroad operates under only a portion of this land, approximately 14,000

square feet, and 26,000 square feet are free of any railroad occupation. It was in connection with this parcel that the Chicago News was given the right to tunnel under the tracks of the Railway Company, this tunnel leading to the river front where a shaft is placed to accommodate an elevator so that newspaper rolls unloading from the river can be dropped down and carried under tracks and lifted again into the newspaper plant. That is what I call having river frontage, and the only river frontage they get is by virtue of a tunnel under the tracks that gives them a sort of entrance on to the river fully adequate to all their needs. This parcel that was leased contained an option of purchase which has never been exercised. In addition to the rental of $45,000 a year for the first 15 years, the Chicago News Company is obligated to build a structure which would exhaust all the steam and gases which are created in this area and also to support it in accordance with the plans and in such a manner as approved by the Chicago Union Station Company only. The taxes are to be divided on the basis of division of values between the two owners, which basis has not yet been established.

Looking at what purports to be a copy of a lease of August 1, 1927, from the Chicago Union Station Company and others to the Chicago Daily News Printing Company, regarding the payment of taxes the outlines are, on general terms, that the purchaser, the Daily News, assumes quite a share of the tax burden. I find a statement in this lease that tract C is the parcel which has been deeded the same date to the News, being the 100 by 400 parcel, and if tract C is that it would follow A and B would be the two parcels that are being acquired by lease, and then the provision as to taxes is that in case the property is assessed for taxation as an entirety—excluding, of course, office buildings—that the lessee shall pay two-thirds of the taxes and the lessor one-third, to-wit, two-thirds for the air right area and one-third for the sub-surface area which is reserved for railroad purposes.

The Chicago News Building is located over the part of the tracks which go out in fan shape, which is a portion of the throat of the terminal. The rentals to be paid under the lease are $45,000 a year for the first 15 years, $90,000 for the next ten years and $175,000 a year for the remainder of the lease period of ninety-nine years. For some purposes Chicago has one center of business and for other purposes it has another center. From the standpoint of the financial center, that exists on La Salle Street, and the re-

tail center unquestionably is State Street. The Chicago News Building is about 1700 feet west of La Salle Street at Madison Street, the middle of the financial district, and it is 3,000 from State Street and Madison Street, which is considered to be the hub of the retail district. Immediately west of the Chicago Daily News Building is the comparatively modern Chicago & Northwestern Railway station, having been put in service in 1910—more or less. South of the Daily News Building along Canal Street there exists the train sheds and tracks of the Union Station for two blocks, 800 feet. Along the west side of Canal Street from the Daily News Building south there are two blocks of properties, 90 per cent of which are in a very dilapidated condition and are used for labor agencies, what they call the "flop houses," some vacant places for automobile storage in the open, and some burned down buildings that are not being replaced, where people have been waiting for years to carry out some permanent improvements. North of the Daily News Building across the street and east of the Northwestern Station is the plant of Butler Brothers, wholesale distributors of merchandise of all kinds, which is a warehouse and distributing building with no shops at the street level of any kind. On the east side and immediately across from the Daily News Building there is now being erected the new Chicago Civic Opera Building, occupying an area of approximately 60,000 square feet, containing the opera house itself and a small theatre and an office building, part of which is to be 18 stories high above the opera house, and the center feature consisting of a tower 500 feet high, with a large amount of office space. This is directly across from the Daily News Building, across the river.

The river is 200 feet wide at that point. We in Chicago assumed the river to be more or less of a dividing line as to the character of business carried on on one side and the character carried on on the other up to a few years ago, but after the Tribune put up a building across the river and the development started on that side we had the surprise of our life. On the other side of the river, in spite of the fact there are all these bridges, property values are practically equal to what they are on the south side. We hope that by developing the Daily News that we will help in developing the properties on the west side. The Daily News is on the west side of the river and the new Chicago Civic Opera Company is on the east side. It is a fair statement to say that up until two or three years ago it was con-

sidered that the property on the east side of the river was very much more valuable than that on the west side of the river where the station was, and that now there seems to be some growing opinion that the properties on the west side of the river either do now or will have a value equal to that on the east side of the river.

The Chicago Union Station was completed in 1925, and the entrance to that station is approximately 1,000 feet on the street level from the Chicago News Building, which is 98 per cent. completed now, and is occupied by tenants but not by the paper itself. The situation on the west side of the river of having these dilapidated buildings, flop houses, vacant places, burned down buildings and the like has obtained ever since the ordinance was passed providing for the Union Station. What happened at that point was simply this: A great many people, on the assurance and belief that the property values around the new station would increase to a very large extent, secured and bought control of properties all around there to an extent that it became impossible to develop anything there and make it pay, with the result that everything died immediately in the neighborhood of the station for blocks in both directions. These same people who bought all the properties at a high price have held them for a number of years. Interest and taxes have accumulated so that now, in order to produce any improvement around there, for them to get out with a whole skin, they must get a value out of it which does not exist today, and that is the underlying basic reason why nothing has taken place around the station and they are just waiting for the values to come back sufficiently so that they can get out. It is my opinion that a development of the sort of the new station and the Chicago News Building would normally tend to increase values in surrounding property, and that has been the history of such developments.

The option figures in the lease for the Chicago News leasehold property are an option to purchase in the first period at a figure of $1,800,000; second period, at $2,500,000, and during the remainder, for $3,500,000. As to whether those figures are based upon the same conception as the people had who went in there, and bought up all the property surrounding the station after the ordinance was passed, I must say, having negotiated these very figures here with the owners of the Daily News, that they were arrived at after scrapping across the table and sometimes

without any logic or common sense, simply because it was the best we could do until our minds met.

I explained that there had not been much air right development around the Pennsylvania station in New York City because free property around there could be purchased and the property was not of very great value, and that the reason for the difference between the Pennsylvania air right development and the New York Central is the difference in the value of the surrounding land. It is a fact that after the air right developments started around the Grand Central that they were greater, beyond all conception, than was to be expected. I know nothing of the value of the property in the neighborhood of the Wheeling property in Cleveland and the Cleveland Union Terminals except the figures which have been mentioned by the witnesses heretofore in regard to various purchases, actual purchases made in this very neighborhood. In the last week, after listening to this testimony and before getting ready to testify, I inquired to see what those figures were and what everybody was talking about, and naturally before considering this matter I ascertained to the best of my knowledge what actual sales had brought in this district. My source of information as to those sales was Terminals, who opened their books to me, and Mr. McIntosh, an officer of Terminals, gave me at my request a list of 25 or 30 purchases in the district along Ontario Street from the Square all the way down to Eagle Avenue. I did not request information as to area, as to when they first took steps to acquire the property, as to whether that property was subject or not to a lease, because I am not a real estate man. I wanted general information to guide me in reaching conclusions as to the possibility of developing air rights over this particular piece of property. I was not asked to go into property values in a sense that a real estate man would be asked to go into them, and therefore I did not ask for such information because it is outside of my field. I have not based any opinion on the economic value of erecting a structure over this property. I have only submitted these conclusions of mine that a structure over these railroad facilities would suffer disadvantages, which would, capitalized, and in other form, amount to so much. Whether or not this property can stand such a development, whether or not its ultimate value is such as to justify that, is outside of the scope of my investigation. I give absolutely no opinion on that point. I wanted to know all the facts that control the situation but the value of the property was

not an element in my calculations and I have not said anything in regard to it. I looked into the question of the value of property in the square where the Terminal Tower is located just incidentally and they gave me the value of that as the figures that I have heard from them in discussion of this value of $82 a square foot or something like that for air right on a certain piece of property centralizing on the public square, and they told me that their air rights had appraised that much. They did not tell me that the property on the square had about the highest value per square foot of any in Cleveland.

I know something about the relative values of property around where the Chicago News Building is and the values over on La Salle and State Streets in Chicago. We were able last year in negotiation to assemble 45,000 square feet on State Street in the Loop district at about $160 a square foot for the complete fee to the property, which I think is a fair value at that particular point. I have not had any direct contact with La Salle Street values, but they are considered approximately equal to State Street values, in spite of the fact that the property is used in a different manner. To my mind there is a very great deal higher value for property on State and La Salle Streets than there is over on Madison Avenue and around where the Chicago News Building is. The Marshall Field development over the Northwestern Railway would be about 2,000 feet on an air line from the Chicago News Building and it does not go toward the higher priced properties of La Salle and State Streets. The property where the Chicago Daily News is now located being contiguous to one station and within two blocks of the Union Station has a value, from the standpoint of location, which the Marshall Field property does not have. I would say there was very much difference in the value. If I may be permitted to illustrate, the Chicago Daily News location has passing in front of it 60,000 people in the morning and 60,000 in the evening, or approximately that number, which makes the property very valuable. No such condition exists in the case of the Marshall Field location. There is nothing there to attract people or to call for anyone to go there. In the main the number of people passing by a property is the major element of its value and the more people you could get to go by a piece of property the greater its value should generally be.

The bringing of the surface lines as well as rapid transit lines into the Cleveland Union Terminals depot,

thereby introducing into that depot greatly increased numbers of people each day would have an effect upon property values in that neighborhood if it could be demonstrated that these people when they leave the station would flow by that particular neighborhood. In the case of the Chicago Daily News the people all go in the direction of the Loop, the line of the elevated that distributes them out over the city. The Marshall Field project is now a building for warehousing, for display and for sale, and a multitude of things, and has got into the class of a retail store, as well as a storage place, not only for Marshall Field but to outsiders to whom they are leasing space. I assume there is an advantage for some of the things they sell in a store like Marshall Field being able to combine its warehouse and its sales space. It would save a lot of trucking back and forth between their warehouse and their sales room, and if the railroad would run right into their building where it could unload and load both carload and less than carload freight, that would eliminate a great deal of trucking. As to whether Marshall Field can elevate their freight cars to any floor of their building, I know it was discussed at the time, but I could not say whether it was provided for or not. It is entirely possible that facilities of that sort would, to some extent, offset the burden that is placed upon air right property as against free property that did not have such facilities, but to what extent it would offset is a question that would have to be determined in their particular case; in other words, you would have operating costs against charges on increased capital and expenses.

I have testified that in order to utilize the Wheeling property for air right purposes girders or spans running from 80 feet to 150 or 160 feet long would have to be put across on piers. In figuring that distance I went outside of the steam operated track, from the most northerly steam operated track to the southerly limit of the property, and I did not include in my estimate any of these traction tracks. I know what are traction and what are steam tracks. In my calculation I am bridging over five steam tracks on 16 foot centers, which would be about 80 feet at the east end, at what might be called the easterly or southeasterly end of the Wheeling property. Where the tracks fan out I stated the higher figure. I would not feel disconcerted about putting up pillars so as to take care of 80 foot spans at that easterly point if it was combined with additional buildings. It would permit me to brace the structure in a transverse direction. If I had to put two columns 80 feet apart and

then on top of that put a girder and then on the top of such a girder a building, then I would be distressed. If this 80-foot span was part of a large and expensive improvement, I would not be disturbed at all. I would want to go over here to the east a little further to run a span or spans in that direction, and there is room enough here to run the spans down toward Canal Road, so that from an engineering standpoint which goes not only to the construction of buildings but to the possible interference with the tracks, I would not feel distressed about it, but if I had to pay for it I would feel distressed. From an engineering standpoint I would not have any hesitation in putting up such spans at the east end so far as the use of that property for terminal purposes goes.

I know that there are some holes in the walls along this easterly side near Ontario Street, which were explained to me as being made to make it possible to build caissons in case some developments are created there which would render it feasible to put caissons at this point. Maybe I could and maybe I could not build pillars up on those caissons to carry the spans referred to at the east end of this property. Pillars and caissons and their spacing, their location, and their sites are so much a function of the building that you have put up that I have not found it in my own work feasible to make them meet all conditions. So I do not know whether they have left enough holes in this wall to take proper caissons, which in turn would have to carry proper pillars.

Running along to the westerly end opposite Huron Road, I did not state that I could not get along without using spans at least 160 feet long. I stated if these owners were my clients, in all conscience and as a professional man I would advise them for their own safety not to put any interference in that layout. I would modify the statement that they could never put any pillar in the area crossed by all of these tracks opposite Huron Road. If you put in pillars that carry a structure of limited importance or low cost or a street or a viaduct, a thing that can be changed or modified without too great a burden, I would permit its construction provided it met some other requirements, which would take time to study. I would be against the encroachment by support of such size and nature to carry a building of great loads. The danger to the superstructure from removing the pillars in the event of a change in the track layout can be overcome. The objection I have to putting a pillar opposite the layout in that network of tracks is from a cost standpoint, from the standpoint of inability to take it

out, and I stated from other considerations that would develop by additional study of the actual plan if one is given time enough to produce such a study. With the track layout of this complexity, I would take six months to study and make you a report whether or not there are dangers involved in it, and whether or not, in my opinion the situation would demand changes from an operating standpoint. I mean to say simply this; that I would not put piers in today, but whether a switch is to be put here or there, or whether a cross-over, or whether a line of cross-overs is to be put in one place or another, or whether so many are needed, or less, is a matter that I would have to take and make an entire study of the train movements in this station, both at present and at future contemplated, and take all the time element into consideration, the switching and all that, which involves working diagrams of an extensive nature, and all that sort of work. I spent three weeks on these plans and I would not be presumptuous enough to say that these plans are either right or wrong.

The burden of $10 a square foot, concerning which I have previously testified, is my estimate of losses due to loss of basement space, and the other, the $15, is due to increased cost of structural elements of the building, making $25 as the general burden placed upon air right construction. As to how I arrived at the $20 a square foot burden placed upon the Wheeling property, from my experience with the buildings erected and taking into consideration the peculiar conditions surrounding this particular property, I figure there would be a probable addition of $5 per square foot more for steel work to my figure of $15 a square foot, which was a general figure arrived at after investigation of many buildings. I gave the Wheeling land credit for basement space upon the assumption that there is such a distance between Ontario Street and the tracks of the terminal as to permit the introduction of a basement that might be used in a satisfactory way. In the case of the Wheeling I have eliminated the $10 a square foot for loss of basement in its entirety and I have increased the normal cost of the steel work from $15 to $20 because of the excessive limit to the freedom of design and also on account of the fact that the foundation conditions in this particular location are very difficult and much in excess of foundation construction on free land where railroad occupation of this design exists in the City of Cleveland. I figured on sinking caissons 150, 160 or 170 feet deep in arriving at my $20 per square foot burden as to the Wheeling. If the space is free, with no tracks over it,

it is possible to put on a floating caisson so as to avoid going down 170 feet and that has been used in Cleveland even in the quicksand districts. The disadvantage of putting down a floating or using a floating caisson construction here over putting down caissons 170 feet deep to solid rock here at this particular point on the Wheeling property is that, with the imposition created by a concentration of load we get such a high loading on some of the columns that it becomes a practical impossibility to spread foundations to such an extent as to bring the unit load under the foundation within accepted practice, and the only way that these huge loads can be carried is by concentrating on the small concrete shafts and carrying them down to a point where it is not necessary to spread in order to reduce the unit load. In the case of a city lot where we cannot spread the situation is different from this fact. There is no such load concentration as we have here.

[In talking of air right development over this property I am thinking of a normal building, such as is being erected by Terminals, of 18 or 20 stories high, but the situation would not be changed materially if the building was only half the height, or 15 stories high. The loads even then would not be such that they could be carried by spread foundations. In the case of a building facing 150 to 200 feet on Euclid Avenue, nearly the same depth on Huron Road, and going through from Euclid Avenue to Huron Road a distance of about 200 feet, being 7 or 8 stories high, and built on quicksand, the floating caisson construction is usable if the quicksand is enclosed, so that it cannot flow away from under your foundation. If that kind of a structure were placed over the Wheeling property, we could not use the floating caisson construction and get away from these deep caissons because, in the first place, when you do that the unit load under the burden of the floating foundations must be restricted to perhaps two or three tons per square foot for such a low limit. If you concentrate, as generally would happen in this case, a load of four or five million pounds, say, two thousand tons, the size of such a foundation would become so large as to preclude the possibility of locating it at this particular point; furthermore, if the work were to be done after the tracks are installed the amount of space required for changing any such a type of foundation would be so great and the complexity of carrying out such work would be such as to practically render impossible even a consideration of the scheme. Even though this property had no tracks on it and such a construction would be built prior to the placing thereon of the tracks so as to make it

available for an air right structure after the tracks had been placed, I would not recommend it from an engineering standpoint. Ontario Street is so high and imposes such loads on the sub-soil that the disturbance such as would be created by driving large open shafts in there and taking the sand out and the subsidence of the soil, would be such that I would feel it would be too great. The wall built for a distance south of the line of Ontario Street must go down somewhere in the neighborhood of 60 feet below the street. Ontario Street is about 89, 90 or 91 feet city datum, the track being 60 feet from that. The fact that that wall was there might make some difference in the load from Ontario Street that would be placed on this lower property; it would take more of an investigation before I could know that it would. The conditions created in here by taking out so much soil and disturbing your slopes are such that I would not venture an opinion in connection with it without a very deep study. I don't say that excavating some of that soil has seriously affected conditions there, nor that there is an effect nor that there would be an effect. I say I have not made a study and investigation of that situation to an extent to permit me to give a professional opinion on the subject.

I know that a wall has been built on the east side of Canal Road which goes down almost to zero datum, about 92 feet below Ontario Street. I can conceive of no reason for that wall being built other than to retain the loads, the soil and track loads that are imposed on it. Bearing in mind that there is a concrete wall along the east side of Canal Road that goes down to City datum and that that is on one side of the Wheeling property, and that on the other side of the property there is a concrete wall on Ontario Street which goes down to about 30 city datum level, I cannot answer without further studying the question as to whether proper measures have or have not been taken to prevent any subsidence of the soil on the Wheeling property as a result of th onstruction of an air right superstructure. If those retaining walls were removed and the scooped-out area were returned to approximately its original condition, the Wheeling property would be capable of a different and perhaps and possibly a similar development, but whether the property would be able to carry the same loads in the same way as before the natural condition of the contour of the ground was changed would be an entirely different problem.]

I was not asked to give and have not given any written opinion on the possibility of air right development over

the Wheeling property. I have referred to a condition that I was called upon to meet in the Chicago Union Station due to the derailment of one of the engines backing out. There are different kinds of engines in use in Chicago. In a station where they are using one type of engine and that an electric locomotive, we are not apt to meet with difficulties such as I have mentioned to the same extent, and from that standpoint there would not be the same difficulty in connection with possible obstructions between tracks. As to whether we don't need as much space for electric engines to operate in, we provide the same clearances of 17 feet, and provide clearance over the tracks of 17 feet over the top of rail, which is about what my study shows is to be allowed here in this station. Knowing that these tracks are to be at 52 City datum and allowing 17 feet for clearance, which brings us up to 69 City datum, in appropriating a right of way for such railroad use I would appropriate to the clearance level, 69 City datum level, so that all space above 69 datum level would be available for construction and development of air right facilities. The spans and so forth would be part of that development, and if Ontario Street is about 91 datum level, that would give us about 22 feet for foundation structures for the basement, and girders and tracks and all the structural elements required to carry the load, and probably for the basement provided we put the first floor exactly on the level of Ontario Street. The first floor in a building is very often above the level of the street to allow for window ventilation on the street. If you want store fronts or retail stores at the street level you don't do that; you stick as near to the street level as you can.

About a year or more ago I wrote an article for the Western Society of Engineers, but I am not familiar as to whether or not it was published in Railway Age. The article you have handed me is that article written by me as it appears in the Western Society of Engineers magazine. I wrote it, and it was not just put under my name, and I still adhere to the statements made in that article, and in the discussion, in general.

Intervener, The Pittsburgh & West Virginia Railway Company, offered in evidence as Exhibit 121 the article so identified and the same was received.

[Re-Direct Examination by Mr. Boyd.

There is a retaining wall in front of the Wheeling property on a portion of Ontario Street east of Huron

Street, almost directly across East Bolivar Road. I know that between Huron Road and the Wheeling property there is another piece of land, and this retaining wall is not on the Wheeling property. It stops before it reaches it. The retaining wall starts at the corner of the Public Square and Ontario and is on the west side of Ontario Street right along the street and property line, and runs all the way through until it gets probably 50 feet south of Huron Road where it stops. Before you get to Eagle Avenue there is something like 250 feet of retaining wall, running straight from Central Avenue westwardly until about the Wheeling property, which, however, is not a wall on the street line but is a wall which retains a slope. The Canal Road wall is a retaining wall also, holding up the bank above Canal Road. It is built on caissons. The bottom of the wall goes down to City datum and the caissons go below datum, but I do not know how far below. I was never called upon nor requested by the Terminal Company, in any part of this case, to make any investigation of the land values or values of the Wheeling property at all, and I was called upon only to make an investigation from the engineering or construction standpoint.

Re-Cross Examination by Mr. Taplin.

The plans here as shown on Exhibit No. 109 do not indicate the retaining wall at all, so it is impossible to tell if the retaining wall along Ontario Street appears as going to any point on the Wheeling. In my study of this proposition I was advised that this retaining wall along close to Ontario Street was stopped at the Wheeling property only because the Terminals had no right as yet to take possession of the Wheeling property, but that that wall is projected and is to continue through the Wheeling property when they have a right to go upon it. Columns spaced between tracks and on platforms and steel work, girders, on top of the columns, and steel and concrete floor support Huron Road extended across this network of tracks. At the easterly end of Ontario Street some support for Huron Road extended will come at the corner of this network of tracks at some location in here (indicating on exhibit). I do not know that the Wheeling property will stop on its north end at Huron Road extended. Assuming that the property will stop at its north end on the south side of Huron Road extended, any structure erected thereupon would have support at some point in the network of tracks where there are supports for Huron Road extended. A bridge work might

be extended from such a point south across the network of tracks, making a very much shorter bridging than I have heretofore referred to as 180 feet. The assumption that you can make one support do for carrying both the viaduct and the structure is unfounded. It would have to be on a separate support. It would not be good engineering in a structure of this length to fix that support so that it would carry both the viaduct and one point of the structure, and you would not do it. You would put one alongside the other but you would double the support. Assuming that the property of the Wheeling is as stated, a girder or span 165 feet long would have to be used from the point previously indicated to me (indicated on Exhibit No. 109) in order to go the shortest way across the network of tracks. I got 180 feet on my other measurement because I came entirely outside of the steam tracks and put my pillar in between the steam tracks and the traction tracks.]

Adjournment.

May 17, 1929.

The following exhibits were offered by Mr. Boyd, Counsel, and received in evidence:

"Intervener's Exhibit No. 110, Boyd Counsel," being Ordinance No. 47814 of the City of Cleveland.

"Intervener's Exhibit No. 111, Boyd Counsel," being Ordinance No. 48426, of the City of Cleveland, amending certain sections of Exhibit No. 110.

"Intervener's Exhibit No. 112, Boyd Counsel," being Ordinance No. 51011 of the City of Cleveland.

"Intervener's Exhibit No. 113, Boyd Counsel," being Ordinance No. 63106.

"Intervener's Exhibit No. 114, Boyd Counsel," being Ordinance No. 63754.

"Intervener's Exhibit No. 115, Boyd Counsel," being Ordinance No. 66292-A.

"Intervener's Exhibit No. 116, Boyd Counsel," being Ordinance No. 67538-A.

"Intervener's Exhibit No. 117, Boyd Counsel," being Ordinance No. 82999.

"Intervener's Exhibit No. 118, Boyd Counsel," being Ordinance No. 84809.

"Intervener's Exhibit No. 119, Boyd Counsel," being Ordinance No. 85552.

"Intervener's Exhibit No. 120, Boyd Counsel," being a statement of train schedules prepared by witness Schaff at the request of counsel for intervener, The Pittsburgh & West Virginia Railway Company.

H. D. JOUETT, recalled in rebuttal by intervener, The Cleveland Union Terminals Company, testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I made a computation of what might be termed the out of pocket cost to Terminals for the use of the union terminal by Wheeling as provided for in the proposed contract before the Commission for consideration in this proceeding and arrived at a figure of $19,110. This figure includes an additional station force of one ticket seller and one baggage porter or $3,000 per year, an estimated cost for heating Wheeling's cars of $250 per annum, an estimate of $8,050 for power, maintenance of locomotives, fixed charges of locomotives employed in hauling Wheeling's trains and share of locomotive crews in hauling Wheeling's trains, $7,810 for interest, taxes and maintenance of additional construction required to bring Wheeling's trains in the station, making a total of $19,110.

The pedestrian entrance to the Medical Arts Building is on Prospect Avenue westerly of Ontario Street, and to the Garage building on Prospect Avenue westerly of Ontario Street adjacent to the entrance to the Medical Building. The vehicular entrance to the Garage building will be on Huron Road when that street is constructed, and for the time being will be through a temporary entrance from Ontario Street. There will be no entrance for pedestrians from Ontario Street and no entrance for pedestrians to either the Medical Arts or Garage buildings from Huron Road except that a pedestrian might use the vehicular entrance.

CROSS EXAMINATION by Mr. Hoppe.

There will be stores in the Medical Arts Building on Ontario Street. They will face on Ontario and on Prospect Streets. The pedestrian entrance is from Prospect. There are connections from certain floors of the Medical Arts Building to the Garage Building. The floors of the two buildings are at different levels. The Garage Building has nine floors. Both the Medical Arts and Garage Buildings are connected underground to the station and to the

Terminal Tower Building through the general passageway. Should a department store be erected at the corner of Ontario Street and the Public Square or across the street at the northwest corner of Prospect and Ontario, provision has been made for an underground passage connecting with the Terminal.

Incoming Wheeling trains will be picked up by electric locomotives within 200 feet of Terminals' tracks and the run of the electric locomotives will be about 2,000 feet. Outgoing trains will be hauled clear of the terminal tracks, the locomotive being on the head-end, perhaps a thousand feet outside the terminal limits, the run of the locomotive being approximately the same as on incoming trains. When Wheeling's trains come up to the point of connection an electric locomotive will go out from the station area proper to meet it, not necessarily 2,000 feet since the locomotive might happen to be right at the point of connection although possibly but not probably it might be at the other side of the station area. I anticipate that the electric locomotive will stay with the train until the passengers are off, then back the train out onto Wheeling's tracks, where it will be disconnected and that it then will return to the station on other business. An electric locomotive crew is composed of two men and the crew of the passenger train will stay right with the train coming in. I think the Wheeling conductors and the Wheeling brakemen will take care of the disconnection of the Wheeling steam locomotive and give the necessary signals, etc., to the crew of the electric engine to connect to the Wheeling train. I assume the Wheeling crew will be paid by the Wheeling until they are discharged from the train, that is, until after the passengers are unloaded and until such time as it is taken back out to Wheeling's tracks. Not being an operating man it is purely speculation on my part as to whether there will be only two paid employes of Terminals on the electric locomotives, but ordinarily there are only two. My figure of $8,050 for locomotive crews is based on the regular rates paid locomotive engineers and firemen, the computations being made nearly a year ago. I do not have the wage scales here but they are the regular scale of wages.

Under the contract between Terminals and Wheeling, Terminals assumes the obligation of taking Wheeling's post office or mail cars into the station in advance of regular trains so that the mail can be prepared and milk and express loaded before the trains are ready to move out. If the electric locomotive goes after the separate cars it

might require four trips to get these cars as well as the passenger cars, but I do not believe this would be necessary as I believe they would back in the Wheeling train complete including baggage and milk cars and hold the whole train on one of the passenger tracks in the Terminal while the loading of mail, passengers, baggage and milk was being done.

My figure of $19,110 is not based upon 3,000 trains or 14,000 cars but upon the 2,500 odd trains that the Wheeling is now operating, an average of 3.3 cars to the train. If Wheeling should operate another 500 trains, it would increase the cost of train handling only, that is, power and crews, share of locomotive maintenance and some slight increase in the cost of heating cars, which is almost negligible. My figure of $8,050 included $490 for power but I do not have the rate per kilowatt hour. We will probably purchase power, but I couldn't give you from memory the present traction power rates of the Cleveland Electric Illuminating Company as there are a number of elements entering into it—demand charge, service charge, consumption charge and allowance for power factor. I do not have the detailed figures as to the maintenance cost on locomotives nor as to how many locomotives are included. The price of an electric locomotive such as Terminals is going to use is about $155,000, and Terminals contemplates purchasing 22 such locomotives.

The item of $7,810 figured for interest, taxes and maintenance of additional construction covers the switch or siding to be built somewhere in the proximity of Eagle Avenue leading off the Terminals' tracks and connecting with Wheeling's tracks as indicated on Exhibit No. 31. That cost of additional construction is $93,500 based upon the proposed form of connection shown in Exhibit No. 31. That form of connection might be changed, but if changed it will probably be to cheapen it. The connection is exterior of the Terminal tracks. The steam engines of the Wheeling will be cut off outside of the Terminal tracks. The Wheeling engine will not have to pull between Point Q and Point P to the extent of getting onto the Terminal tracks. It may be necessary in the construction of that entry to acquire some land between Eagle Avenue and Central Avenue, and the cost of such acquisition is not included in the figure of $93,500. Under Terminals' agreement with Wheeling the cost of making this connection is to be at the sole expense of Terminals. In estimating the cost of the construction of that track together with the run-around

track at $93,500, the cost was figured on the basis of the lines shown in red on Exhibit "A" attached to Exhibit No. 15 but the cost of acquiring land upon which the lines in red are shown in Exhibit "A" attached to Exhibit No. 15 was not included.

The distance from the point of switch in track "H" of the Terminals Company to the point of switch at point "A" on Exhibit "A" attached to Exhibit No. 15 is 950 feet, and this was included in my estimate of the distances which an electric locomotive would have to pull Wheeling's trains. I figured electric locomotives would pull Wheeling's trains from a point easterly of the point of connection with the terminal track. In other words, Wheeling's trains must stop before they reach Terminals' right of way, the steam locomotives being cut off and the electric locomotives put on and the trains then hauled into the station. I figured the 2000 foot haul on the incoming trains from point "Q" (Exhibit No. 31) to approximately the center of the station, and on outgoing trains from approximately the east end of the platform to point "O". I think the electric locomotives taking in incoming trains would back the trains out and not pull the trains beyond the center of the station, disconnect and then run around and hook onto the other end of the Wheeling train to pull it out. My figure of $7,810 was the cost of maintaining this connecting track and run-around and did not include the cost of maintaining any portion of Terminals' tracks from the point of connection into the station proper. The figure of $8,050, which includes an item for maintenance of locomotives was not for the maintenance of one locomotive but was worked out on a locomotive mileage basis. I estimated the number of locomotive miles that would be run in this service and then the unit was applied and the figures obtained. I do not have the detailed figures showing the locomotive miles charged to the Wheeling. We are going to have 22 locomotives and if all the locomotives are in service at one time there would have to be 22 crews. I anticipate all would be in service at certain times, the percentage varying with the traffic. If we put on a crew for one or two hours because traffic during that period is heavy, we will have to pay them for eight hours just the same, but traffic conditions go by days rather than by hours. I figured not to exceed 30 minutes for an electric locomotive to go out and get a Wheeling train, put it in the station, unload or load, maybe both, and return the train to Wheeling, and then come back again. A train being brought into the

station for loading might be held on the track for some period of time, the locomotive being disconnected and used for other service and then put on the train again, so that the locomotive would not be attached to Wheeling's train all the time it was standing in the station and would consume not more than 30 minutes while so attached.

Assuming the Wheeling has 200,000 people who will be carried in and out of the new terminal annually, I do not see that this would place any burden on the station, and my estimate of out-of-pocket cost made no allowance for these passengers except to the extent of increasing the station force by one more baggage porter and one more ticket seller. The figures to which I have testified were compiled by my force, by those who know more about it than I do, and under my supervision but I did not check them personally. In figuring the cost of operating locomotives I figured not only power but the cost of the crew, but I do not have with me the details of power figures and the cost of crews, nor the cost of maintenance of locomotives.

The train crews of the New York Central will come in on their trains from Collinwood and go all the way out to Linndale and there will be two men on the electric locomotives paid by Terminals. The crew of the Central trains who will assist the engineers and firemen of the electric locomotives of Terminals will be paid by their respective railroads. In my figures of $19,110 I did not include anything for the cost to Terminals of receiving and dispatching United States mail, railroad mail, newspapers, and company materials and supplies, nor any expense for receiving and delivering milk in baggage cars on inbound passenger trains in the manner now handled by Wheeling, and the loading of empty milk cans for return movement except only to the extent of adding one additional baggage porter. I included nothing for the furnishing of space for the receipt, delivery and storage of express shipments via the lines of Wheeling, nor for the furnishing of information by clerks, bulletin boards, notices and otherwise, as to the arrival and departure of Wheeling's trains. I included nothing for a dispatcher, nor for operating a signal tower, nor for interlocking devices.

RE-DIRECT EXAMINATION by Mr. Martin.

I did not include the above items because we will have exactly the same expense whether we handle Wheeling's trains or not as regards those items, and I included only

the items concerning which the operation of Wheeling's trains will add to our cost so as to make my estimate strictly upon an out-of-pocket cost basis. If the operation of the Wheeling trains in and out of the station is permitted our costs will increase by whatever figure the estimate shows. If it is not permitted we will be relieved of those costs and those costs only.

Under the present proposed scheme of operation the electric locomotives will haul Central's trains between Collinwood and Linndale through the union station, the total distance from Collinwood to Linndale being from 16 to 18 miles. The electric locomotives will haul Big Four's trains between the union station and Linndale in both directions or between 6 and 7 miles in either movement. They will haul Nickel Plate's trains between the union station and East 55th Street in either direction, the distance being between 2½ and 3 miles, and also between the union station and about West 41st Street in either direction, the distance being about 2¼ miles. These roads will pay the cost of hauling their own trains on their own tracks on a locomotive mileage or car mileage or some other similar unit basis, the exact basis not having been fixed as yet but being left for decision when the terminal goes into operation. The transportation expense which they will assume directly relates to the trackage beyond the terminal limits, that is, between East 40th Street on the east and West 37th Street on the west. As to the transportation expense involved in the movements between East 40th Street and West 37th Street through the station, it will be borne in the first instance by Terminals, and so far as it applies to the trains and cars of the three proprietary lines, will be apportioned to them upon a unit basis.

If the number of cars at present operated by Wheeling should increase but without any increase in the number of trains, there would be no added crew expense, and the increase in the cost of power would be slight but not in direct proportion since there would be a considerable amount of work to be done by an electric locomotive the cost to Terminals of which would be the same whether it was handling a train of five cars or one of ten cars, and the light movement back and forth would be the same in either event. Even if Terminals' electric locomotives were not cut off at point "Q" on Exhibit No. 31 but operated to the farthest possible point, say point "O," on the outbound movement and from that point on the inbound movement,

this would not materially increase the cost of hauling Wheeling's trains into and out of the station, the distance between points "Q" and "O" being about 650 feet. The normal operation calls for a movement of the Terminals locomotives as far easterly as Point "Q" in bringing a train into the station—as far easterly as Point "O" in taking a train out of the station, and in no case more than a locomotive length easterly of Point "O." The extra movement over the station tracks, due to the handling of Wheeling's trains, would cause a slight addition to the cost of maintenance of the tracks, which we did not consider in our calculation. If it were included, the increase in the calculation would be less than one per cent.

Referring to the question asked me on cross examination as to whether or not the flow of an extra number of 200,000 passengers through the terminal due to the bringing in and departure of Wheeling's trains would add a burden to the terminal, I have not seen the figures of the number of passengers which the Wheeling handled into and out of its Ontario Street station in 1928.

Mr. Martin then read the following statement from Mr. Durham's testimony:

> "Upon this basis I assume that the total number of passengers both inbound and outbound at the [Ontario Street Station] during the year 1928 was 94,164. This does not include passengers handled by special excursion trains. * * * I would say that last year [1928] we probably had 25 [excursion] trains."

Re-Cross Examination by Mr. Hoppe.

In calculating interest on the $93,500, the cost of constructing the additional tracks and run-arounds I used the rate of six per cent and figured the taxes at one and one-half per cent of the total. The tax rate in Cleveland is about two and one-half per cent and property is generally assessed around sixty per cent of its true value. My figure of $19,110 is based on the number of trains that were furnished to us, that is about 2,500 trains, but whether they include excursion trains I do not know. The main power cost of operating an electric locomotive is in starting and stopping, the cost in starting being heavy. The maximum wear on the tracks is not at the point where the engines start and stop unless they are not properly started and stopped.

RE-DIRECT EXAMINATION by Mr. Martin.

I think the cost of starting or stopping an electric locomotive would bear a small percentage, just a few per cent, to the total cost of moving a train by that locomotive for a distance of say, two and one-half or three miles.

W. R. HOPKINS, Manager of the City of Cleveland, Ohio, was permitted to make the following statement under oath:

From reports in the daily papers it appeared that the controversy here and others related to it might result in delaying the active prosecution not only of the work in the terminal but the work in all of the streets from the terminal eastward. That involves such grave public concern that I concluded I should come here and ascertain whether the City of Cleveland should get into the record in this case those facts which we think are of public concern. I conferred with the Chairman of the Commission, Mr. Lewis, asking his advice, and he advised me to see Director Mahaffie, and Director Mahaffie advised me to see Dr. Meyer. It is our understanding that when the matter goes from here it will go not to a Division of the Commission but to the full Commission. The suggestion was also made that there would probably be testimony in this record sufficient for the City to get leave to appear before the Commission, in the hearing before the full Commission. I do not know whether that is so or not.

But these are the facts I would like to have in the record:

First of all, in addition to the extreme desirability that the terminal itself should be put into service at the earliest possible time, there is also the great desirability that the work from the terminal eastward should also be completed. As to the terminal itself, it is only necessary to say that the present Union Station, so-called, is so old and so dangerous—more than 60 years old—that it should long ago have been discarded. As to the matter of these streets, the fact is that every street from East 55th Street eastward to 140th Street, crossed by the Nickel Plate and by the New York Central, is more or less interfered with by this work. For example, 55th Street itself, our second most important crosstown street, is actually closed, and all of the traffic is being handled on a temporary structure. Woodland Avenue, one of our principal arteries

is closed, and that traffic is handled on a temporary structure in Buckeye Road, another important artery. Streets like Quincy and Cornell are closed. Eastbound traffic on Euclid Avenue is cut off. The work necessary to construct the additional tracks for a distance of 9 or 10 miles crossing these great arteries results in such interference with traffic that any unnecessary delay in that work will work a great public inconvenience and loss. And so, without any interest in the contest between these people, we wish to have in the record the fact that there is a great public interest in the City of Cleveland that the matter should be so handled that it should not interfere with the completion of the whole project as rapidly as possible.

CROSS EXAMINATION by Mr. Taplin.

The blocking of these streets to the eastward, which I have spoken of, is simply a part of the construction of the tracks to bring the New York Central and the Nickel Plate passenger trains into the new union Terminal from the east.

I cannot tell what the construction work west of Ontario Street has to do with the completion of work east thereof. What I wished to suggest was that we should avoid, if possible, the doing of anything that could directly or indirectly have that effect. The work of the construction of the streets and cross-overs on the so-called easterly approach, going out to 40th, 55th, on out to the Parkway, Cornell and beyond, could go on just the same as it is going on now, regardless of the Wheeling situation, but the fact is that for some time now, perhaps a year and a half or two years, all of this work has been pushed under tremendously high pressure, upon the theory that the terminal would be put into actual service on January next. I have no doubt, for example, that they have already paid large sums of money to settle claims to get them settled quickly. I have no doubt that in doing the remainder of the work, if they are not going to be able to get into the terminal in January, they would not have the same incentive to crowd that to completion at any cost. In other words, the ability to actually use these tracks on these streets into the terminal would have a financial value that would justify them in putting extreme pressure on all this work which they are doing, so that it could easily happen if they cannot get into the station in January at all they would relax their efforts to complete all this street work before January.

I am familiar with the work that is going on in the city and know that at the present time the old Nickel Plate right of way from the easterly part of the city down to the gully near 22nd Street, say, along in there, Pittsburgh Avenue, is now being widened to make room for a great many additional tracks; that in nearly all the streets and boulevards, where the bridges cross over, the work of widening those bridges is now progressing in varying stages, from small beginnings to considerable progress. I think the work on the widening of a great many of those bridges in the easterly end of the town has been going on practically all of the time, and I do not know that there has been any slowing up in the last week. The Terminals Company has not told me it is going to slow up on that work, but taking bridges like at Cornell, Cedar Glen Boulevard and Cedar Boulevard, under ordinary conditions it would not try to finish many of them before January. They are all big jobs. But if they thought they could get into the station in January, they would then be justified in putting in extra efforts and doing the work under extreme pressure in order to finish the job. I think that is what they are doing. In fact, they cannot finish them by January if they don't put pressure on them, but they can, if they do put pressure on them. I do not know that the steel work for those bridges has all been ordered and is in process of fabrication, but I would not be surprised. They could easily let the steel work hang around without being erected and avoid the extra cost of erection and construction under high pressure. They could get the steel plant to carry the steel for quite a while. I do not know that the terminals interests have spent a great deal of money for the last several years without any assurance of securing the Wheeling station property. I am amazed if that is the fact. That was not my business to know. At the time the location of the Eagle Avenue Bridge was determined, some two years back, I knew then of the controversy between the Wheeling and the Terminals Company regarding the acquisition of the Wheeling property, and I had a talk with Mr. Duncan, and called the parties in and told them they had to settle their differences. I understood they had. The Terminal people delayed on that work quite a while. The Eagle Avenue work did not go forward promptly, and the explanation of the delay for some time was that they were not able to reach a final conclusion with the Wheeling. Finally I was told by somebody connected with the terminal people—I am not sure but perhaps that it was Mr. Duncan

also, that they had settled the matter, and it would go forward, and I assumed it was settled. I did not assume they had acquired the Wheeling property, I did not know how, but I assumed whatever was to be done was done, and I was told that the matter generally had been adjusted, but that did not interest me. What interested me was that the delay at Eagle Avenue was at an end. I don't know that it is the Terminals Building Company and not the Cleveland Union Terminals that is responsible for the construction of these easterly approaches to the station. I would have no manner of knowing that any loss from delay in securing the easterly approach would fall on the Building Company and not on the Depot Company. I am more interested in preventing the delay than in knowing who will pay the damages because I feel a delay will injure the community, and the community cannot get damages from anybody.

The question of the Eagle ramp was not in dispute. The situation was this: The ordinance which the Council passed at the request of the Terminals Company called for the construction of the ramp in a certain general way; for the ramp with grades not exceeding 5 per cent and in a certain location. And if there was delay in actually starting the work, then we prodded them to know why that work was not going forward and why plans for it were not being submitted, and the explanation was they were having difficulty about agreeing with the Wheeling. That was for some little time, but I cannot say how long.

I became City Manager of Cleveland January 7, 1924. My recollection is that the ordinance requiring the building of the Eagle Avenue ramp, to which I have just referred, was passed about a year afterwards, in the spring of 1925. The matter then dragged along for a year or more in connection with the submitting of the plans for the Eagle ramp. The original ordinance fixed the location of the Eagle Ramp in 1925. The delay was not a question of location, but the elevation of the bridge over the Wheeling tracks; wholly a question of elevation and grades. I think you will find that the ordinance passed October 10, 1927 (Exhibit No. 72), is not just the Eagle avenue ramp ordinance. Terminals shifted their whole line from way up on Broadway, and my impression is that you will find any changes to Eagle Avenue were simply to take care of that shift. They shifted their line, and when the general amending ordinance was passed (Exhibit No. 72), they continued their tracks practically following the west line of Broadway and infringing on the triangle bounded by On-

tario, Central and Broadway, going on in that way. Terminals pushed the whole thing farther west, and you will find that the ordinance, for example, amends the section that had to do with Harrison Road. That is south of Central Avenue, and then Central Avenue, and then Ontario Street, and then Eagle, and so on. But I do not think that that did indicate anything special about Eagle Avenue except the shifting. I think the clearance of the ramp over Eagle Avenue had been fixed before. There may have been some slight modifications in detail and I think I can get you clear on the whole Eagle Avenue matter. There were various amendments, but there is an ordinance here and I think it was the one dated January 1, 1925. Looking at Exhibit No. 116, this looks more like that big amending ordinance. There is one ordinance which has 75 amending sections in it and this looks like the May, 1925, ordinance. That corresponds with my recollection. Yes, sir, Section 35. This is the original ordinance for the Eagle Avenue ramp and it says:

> "Eagle Avenue shall be crossed by 11 tracks at elevation 52 city datum between a point 48 feet northeasterly of the southwesterly line of Ontario Street and a point 178 feet southwesterly therefrom, measuring along the line of Central Avenue."

Comparing this one, Exhibit No. 72—on that point on Eagle Avenue there are to be ten tracks instead of eleven. Exhibit No. 72 provides for only ten tracks, whereas Exhibit No. 116 provides for eleven. Then the first measurement in Exhibit No. 72 is 275 feet and in this exhibit (No. 116) the measurement is 178 feet from the center line of Ontario Street. In other words, it shows the shift in the tracks which I mentioned. I think you will find that is the one substantial difference. There is some difference in description, but the real difference is in that shift and reducing 11 tracks to 10 tracks.

The Cleveland Union Terminals requested the passage of this ordinance which is set forth as Exhibit No. 116. The whole purpose of that ordinance was to provide for a new location of their tracks from some point south of Central to a point north of Eagle. They shifted the whole thing bodily west. It is a fact that the Terminal interests originally objected very strenuously to the location of the Eagle ramp where I insisted it go over Eagle Avenue, but we fought that out in the spring of 1925 and ended that question, and then the ordinance, Exhibit No. 116, was passed as a result of that fight in May, 1925. It is cor-

rect that it was passed at my urgent request as to the Eagle Avenue ramp and not at the solicitation of the Terminals Company. I never knew why the tracks were shifted to the east of Eagle Avenue, as shown by Exhibit No. 72, over the location provided in Exhibit No. 116, but taking it as a whole we thought it was more favorable because south of Eagle the tracks were less in Ontario Street. We thought so far as the City was concerned it was a better location than we had had before, but we did not suggest the change and don't know why they did it.

It is a fact that ever since I have known anything about it, beginning in 1924, the City and the Terminals Company have both known that Terminals had to cross the Wheeling property. Before that I had no occasion to know about it, but since, I have known that is a fact. The question as to whether Terminals was justified in going ahead with its plans and spending the amount of money it has, not having acquired Wheeling's property is a matter where my opinion would not amount to much. I would not do it myself, but I cannot judge their business prudence. Answering the question as to whether it does not affect the position of Terminals and of the city to come in at this late date and object and put in the claim that the public interest requires no delay, when the delay has been due entirely to Terminals not acquiring the Wheeling property, I can say to you, so far as the city is concerned and so far as I can speak for it, that throughout all of this legislation I kept in touch with Mr. Duncan, kept him advised of everything that was being done, gave him every opportunity to make any protest he wanted to to the Council, and this ordinance of 1927 was made with his definite approval. I, therefore, had a right to assume whatever the arrangements were between the companies, they were satisfactory. Mr. Duncan has told me since that, on behalf of the Wheeling, he filed an intervening petition in the Cleveland Passenger Station case, and opposed the station on the Square and any attempt of Terminals to involve the Wheeling property therein. I would not have any occasion to know that in connection with the ordinance fixing the Eagle ramp Mr. Duncan provided in an agreement with Terminals that anything done in that respect should be considered as not in any way affecting the Wheeling property or the rights of Wheeling to go on as it pleased with its business. I don't recall that in the conferences I had with Mr. Duncan he advised me he had protected the interests of the Wheeling from encroachment by Terminals, but in order that you may be

clear as to just what I did: Following the policy of notifying people who would apparently be affected by any legislation, and knowing, of course, that the big body of amendments that they asked from us must affect the Wheeling, one of the first things I did when this legislation came in was to send a copy of it to Mr. Duncan and to advise him of the pendency of the ordinance, and kept in touch with him, so as to make sure he would have an opportunity to make any objection, suggestion or protest that he wished in that whole matter. So far as I could properly do so, I kept the Wheeling advised, in fact, of everything I knew so that they might not later complain that the City had not given them any notion of what was supposed to be done. He was fully informed of everything we proposed to do at that time.

[Q. Mr. Hopkins, it comes down to this, does it not: Insofar as the interference with traffic goes on all these streets to the east of Ontario, if there is any prolonged delay in interference therewith over what you had hoped, it will be due to the deliberate act of the Terminals in laying off on the work and not pushing it under pressure. A. Well, it might be put another way. In other words, as a matter of business prudence, they might not be justified in spending exceptional sums of money to drive this work to completion, if, having finished the streets, they still cannot use the tracks. But so far as the city is concerned, it should be borne in mind, for example, that the inconvenience we suffer from this work is very much less in the summer time that it will be in the winter. Any delay in December, January, February and so forth is a much greater delay to the city than it is in July or August. As it is now, their own interests coincide with the public interest and public benefit. I cannot control their judgments, but I do know this: That just as a man, for instance, who is building a building would be justified in spending a lot of extra money for overtime, and so forth, if he had a tenant who would take it on January first if it was ready, but who would not take it if it was not ready until March or April, so, in this case, ordinary business prudence would justify these people in spending more money to speed up the work on all these street structures, if by so doing they could get their trains into this new terminal.

Q. What I want to get at, Mr. Hopkins, is this: That the delay in completing these cross-overs and streets, if any, will be due not to interference down west of Ontario, but it will be due to the voluntary decision of the Terminals

Company, whether based on business prudence or not, to not push the work to the extent that they now are. Is not that correct? A. Naturally they control the work, but naturally, also, if you remove the incentive for speed, you cannot reasonably expect to get it. That is our point of view.

It is not true that the very large temporary bridges which have been constructed over the gully afford just as good transportation facilities as the old dilapidated structures and means of crossing the gully. If you refer to 55th Street, that is not true. The 55th Street bridge is, I think, wider than the temporary bridge. Furthermore, the temporary bridge is a detour bridge and a wooden structure, and the longer it stands there, of course, the less desirable it is as a means of traffic transportation. I had Mr. Hoffman prepare for me yesterday a list of these streets to show the conditions of each one. It shows, for example, that all that cross town traffic on 55th Street is carried on a temporary bridge, as is all of the traffic on Kinsman Road and Grand Avenue. Quincy, Fairmount, and Cornell are closed. Euclid is half closed. Ontario Street right downtown is carried on a temporary bridge. Those conditions are much more difficult and dangerous in the winter time than in the summer. There is a real public interest in getting that work done as quickly as possible.

What goes on or does not go on west of Ontario has no physical connection with what goes on at these various places I have mentioned out to the east, and it is possible for Terminals, notwithstanding anything that is transpiring here, or has transpired in Cleveland in the courts, to proceed just as rapidly with this work to the east as they want to, but if they cannot use the Wheeling property, it means a delay of so long that it would not be ordinary business prudence for them to spend extra money to complete the work on these bridges. It would not be reasonable to ask them to do it.]

EARLE MARTIN, Industrial Commissioner of The Chamber of Commerce of Cleveland, Ohio, was permitted to make the following statement under oath:

I am Industrial Commissioner employed by the Chamber of Commerce of Cleveland, and the Directors of the Chamber yesterday passed this resolution (producing same) and instructed me yesterday afternoon to present it to you.

A copy of the resolution of the Cleveland Chamber of Commerce was marked "Intervener's Exhibit No. 122, Witness Martin," offered and received in evidence.

[Cross Examination by Mr. Taplin.

I am not on the Board of Directors of the Chamber and am not an officer of the Chamber. I am an employe. I was present at this meeting of the Board of Directors, at which there was a quorum present but I cannot give you the names because I have no record of that. The Board of Directors was increased this year, I think, from 15 to 21. I don't know how many were present yesterday but I do know there was a quorum because they passed the resolution. They never transact business unless there is a quorum present; so I know there must have been a quorum. I did not count them. I am familiar with the rules and regulations of the Chamber as respects the conduct of their Directors' meeting because as Industrial Commissioner, one of my duties is to be present at meetings of the directorate. I have never been a director. I assume that there was a quorum present simply for the reason that this resolution was declared as passed and so stated over the signature of the First Vice President. Mr. Robinette presided, and I think Mr. Parker Hill was the secretary of the meeting.

Prior to becoming Industrial Commissioner of the Chamber of Commerce I was a newspaper man, having been editor of the Cleveland Press, Editor in Chief of the Scripps League of Ohio, and later publisher of the lamented Cleveland Times. I have been Industrial Commissioner of the Chamber since January 1, 1928. The Chamber of Commerce business headquarters are located in the Terminal at Cleveland, they having moved over there in either May or June of last year, according to my recollection. They formerly occupied their own building diagonally across the Square from the Terminal Tower, but I do not know anything about the Terminals Building Company taking care of a resale of space designated for the Chamber in order to take them over to the new building.

There was no one present at this meeting of the Board besides the Directors, Mr. Hill, Acting Secretary, and myself, yesterday. I think this document which I have offered in evidence here was prepared after the meeting by Mr. Parker Hill. I received my copy from Mr. Hill, and my instructions from Mr. Robinette. I do not

know with whom Mr. Hill, who is not a lawyer, collaborated in the preparation of this document. The resolution was presented to the Board by Mr. Rogers, President of the White Sewing Machine Company, who had a memorandum of it, over which the Directors worked at considerable length yesterday. They finally passed a resolution; and Mr. Hill prepared it, and about 4 o'clock yesterday after he gave it to me to bring to Washington, Mr. Robinette told me to present it here. There were some amendments to Mr. Rogers' proposal but what they were I do not know. I did not keep the minutes of the meeting, and was not paying any particular attention to the amendments. My attendance at these meetings is a matter of routine. There was finally a resolution presented to the meeting for adoption, but you will have to ask Mr. Hill whether that was the resolution as it is here submitted, or was some resolution that he drew up covering the general sense of the meeting and put into resolution form. I was not keeping minutes and was not paying very strict attention to the resolution. I know that Mr. Hill prepared it as I have said; that he then gave it to me yesterday afternoon; that Mr. Robinette had told me to bring it to Washington, and here I am. I would not say that Mr. Hill prepared it after the meeting; I would say that the typewritten copy was written and signed after the meeting. Mr. Hill was the Secretary, drew it up and got the presiding officer to sign it, and I am the messenger.

There are forty-nine hundred members of the Chamber.

A copy of the resolution of the Cleveland Chamber of Commerce was marked "Intervener's Exhibit No. 122, Witness Martin," offered and received in evidence.]

EDWIN H. MCINTOSH, called as a witness, in rebuttal on behalf of intervener The Cleveland Union Terminals Company testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I live at 2996 Clairmont Road, Shaker Heights, Cleveland, and I have been Land and Tax Agent of The Cleveland Union Terminals Company since August, 1925, having been Acting Land and Tax Agent for about eight months prior to that time. Previous to that, I had been engaged in the real estate business, in the firm of Hampton, Keller & McIntosh. I have been in the real estate business in the City of Cleveland for twenty years and

have dealt in all kinds of real estate. Since August, 1925, I have had charge of the purchases of lands for the Union Terminal area and its approaches, either on behalf of the Cleveland Terminals Building Company or the Union Terminals Company, or both. As such Land and Tax Agent I sometimes make an allocation, which is carried on the books of the company, as between the land cost and the building cost of property that has been purchased and has buildings on it.

I have prepared a list showing the following: the cost of all the properties purchased for the terminal development on the west side of Ontario Street, beginning with the Public Square and running eastwardly to Central Avenue. Exhibit No. 123 is the list so prepared by me, and shows the names of the sellers, as indicated in the column headed "Name," of all the properties purchased for the terminal improvement between the Public Square and Central Avenue on the west side of Ontario. In the second column, under the word "cost," it shows the total amount of money paid for the land set opposite the amount; in the third column the number of feet front on Ontario Street of each of said properties; in the fourth column, "Square foot area," the number of square feet in each separate parcel. I made some of the calculations for the next column headed "Cost Foot Front Ontario" also the cost per square foot, and some of them were made for me, and the list, to the best of my knowledge is accurate. The first column, "Parcel Number," represents a number that is carried in our own office.

The statement referred to, marked "Intervener's Exhibit No. 123, Witness McIntosh," was offered and received in evidence. "Exhibit No. 124, Witness McIntosh," being a map, was offered and received in evidence.

This map (Exhibit No. 124) accurately shows the location of each of the parcels, and such location is given a number to correspond with the parcel number on Exhibit No. 123 in each instance. As to the rule followed by the County Auditor of Cuyahoga County with reference to the valuation of property for tax purposes, my understanding is that the laws of Ohio require the assessing officer to put the land in at its full value—in other words, 100 per cent. For the last 19 years we have had the same County Auditor, who has followed the law in that he tries to value all property at 100 per cent of its value for taxation purposes.

I have prepared a list showing the tax value of each one of the separate parcels of property which are shown on Exhibit No. 123.

(This list was offered and received as Exhibit No. 125.)

Referring to parcels Nos. 72 "W. & L. E." and 73 "Walworth-W. & L. E." on Exhibit No. 125, meaning respectively the Wheeling & Lake Erie and the Wheeling leased parcel, the reason for the omission of any valuations for these parcels is that, being railroad property, they are taxed as a public utility, and the County Auditor does not carry a separate valuation for them on his records. The property numbers which appear on the model correspond to the property numbers of these various lots on Ontario Street as shown on my map. In both lists the property at the corner of the Public Square and Ontario is the property which appears first at the top of the list, then it runs eastward until the property, which appears at the bottom of the list, is at Central Avenue.

Cross Examination by Mr. Taplin.

By the word "cost" in the third column on Exhibit No. 123 is meant, except in a few cases—those being principally south of the Wheeling property—the cost of the land and buildings. Most of the property from the Wheeling station to Eagle Avenue was under long-term leases; and the leasehold estate, buildings and equipment were purchased for a separate sum of money, which I think is not included here. The first item, "Parcel 17, $370,000" is the corner of the Public Square and Ontario Street. I do not recall that that is the corner to which Mr. Bradley's attention was called in his examination in connection with the article he wrote, in evidence here as Exhibit No. 108. Looking at Exhibit No. 108, the picture on the lower part of page 4 is of the corner just referred to. The cut of Parcel No. 17 which I have in my file here looks as though it had been reproduced for this article, but I did not write this article for Mr. Bradley.

There was a 21 foot frontage to that property on Ontario Street, for which we paid $262.97 a square foot. We have a 99-year lease with a purchase option of $300,000 coming in in 1932, and we paid $70,000 for the leasehold estate. We have not yet availed ourselves of that purchase option. The $70,000 represents what we paid for the outstanding 99-year lease and improvements, and the $300,000 represents the option price under and

by virtue of that lease. The date of the 99-year lease is April 1, 1912, and it was assigned to the Loop Realty Company in 1916, with an option to purchase the estate for $100,000, but in the fall of 1921 the Loop Realty Company sold its stock for $70,000. The lease, after being assigned to the Loop Realty Company in 1916, was subleased by that company to the Square Company, a Van Sweringen subsidiary, with an option to purchase the sublease for $100,000, but they wanted cash and in 1921 they accepted $70,000 instead of $100,000. The original lessee was one Sprankle and the Loop Realty Company was apparently a corporation of his. The owners of the property on April 1, 1912, were May and John Zangerle, who on April 1, 1916, made a lease of it for 99 years to J. R. Sprankle at a rental of $18,000 a year, with an option clause for $300,000, with no increase in that annual rental. Sprankle next transferred the property to the Loop Realty Company, in 1916, so far as I know. To my knowledge, the Loop Realty Company was not a Van Sweringen enterprise, nor was there any consideration expressed in the transfer of that lease by Sprankle to the Loop Realty Company nor any revenue stamps on it indicating the consideration, nor was Sprankle connected in any way with any of the Van Sweringen enterprises. In 1916 the Loop Realty Company subleased the entire property to the Square Company for the remainder of the period of their 99-year lease at an increase of rental from $18,000 to $24,000 a year. According to our records no consideration passed other than the increase in rental. Later on there was paid $70,000. The Square Company extinguished the Loop Realty Company and got back to the ground terms of the lease by paying them $70,000 in cash, the $100,000 option price taking up the difference between the $18,000 and the $24,000 annual rental. They capitalized the difference at 6 per cent. When the Square Company took the sublease at $24,000, there was a provision that they should pay $100,000 in addition to the $300,000 option price, so that, on that basis, the cost to the Square Company, if it exercised the option, would be $400,000. In 1921 the Square Company purchased all of the capital stock of the Loop Realty Company, paying $70,000 for it, and then they extinguished the Loop Realty Company. Then they had only the original lease from May and John Zangerle, which had been assigned to them, under which the option price was $300,000, so that by purchasing the stock of the Loop Realty Company they saved themselves $30,000.

There was an old four-story and basement brick building on that property when they bought it in 1921, older than I am and not very much of a building. As to how much of the cost of this property we allocated to the building and the improvements thereon, the conditions of that purchase being as they were, we never set up a separate amount for the buildings at all. It is not a fact that we did not set it up because the buildings were not worth anything; the fact was because of the peculiarities of the transaction. We paid $70,000 for the stock, and did not really pay it for the real estate. We don't own the land yet. We paid $70,000 for the stock in order to get out of paying $100,000, the option price, to that original lessee. Those buildings which were on that parcel were probably torn down in 1924, but I haven't any idea how much wreckage value Terminals got from them as I did not have charge of it. I have never seen the books and do not know anything as to whether the Terminals Company was paid something for those buildings by the wrecking company, or whether they paid the wrecking company something for taking them down. That property on the Square was 67 feet deep.

Taking the next parcel, No. 18, the Webb property, the $232,197.50 represents the total purchase price of that property, land and buildings, there being no underlying lease. I am reasonably certain that there were no other leases in connection with that May Company corner that Terminals had to purchase. The Humphrey Pop Corn Company had a stand on that corner, but I never heard that they had a long term lease on it nor that the razing of that building was delayed some time on account of dickering with tenants for the cancellation of leases. Going to Parcel No. 18, this parcel was purchased from Jim Webb, a grandson of the Kyser Webb whose name appears here. That property was 67 feet deep, and there was a four-story and basement brick building on it. It is my understanding that we did not pay anything for that property other than what was paid to Webb. The purchase was completed November 1, 1923, it having been under negotiation, I think, for two years or some such matter. We did not have any contract for a purchase of that property earlier; we had to threaten appropriation. Terminals had instituted appropriation proceedings.

I know, as a certainty that there have been costs and carrying charges, such as interest and taxes, but I do not know which company they are charged against. I can say

that these carrying charges are above and in addition to the figures that I have put on the statement, Exhibit No. 123. In other words, these cost figures do not include any carrying charges. It is correct that parcel 18 cost somebody, in 1923, $163.03 a square foot. I haven't the information here as to who bought that property on November 1, 1923, but I would think that would be the Cleveland Terminals Building Company, as it is within the so-called air rights area, and I would think it probable that they might have taken over the title, although I cannot be positive of that. I do not know what it cost the owner to raze the building on that property, or what it got from the wrecking company for the building.

Going to Parcel No. 19, the Kendall Seed Store property, that property was leased by Kendall to the Square Company on April 1, 1917. The fee was acquired from Kendall June 20, 1923, for $170,000. I am quite sure Mr. Kendall himself was in possession of that property when the Square Company took a lease of it April 1, 1917, and that he was the owner of the fee, so that, having the lease, we canceled that by acquiring the fee in 1923. I don't know what company acquired it in 1923, nor whether the company that got it paid the Square Company anything for its lease, but it may have, so far as I know. I haven't any record here of any option of purchase in the original lease of April 1, 1917, but I am positive that there was one. I have forgotten the details of that lease. I don't know whether there was one in it or not. The rent reserved in that lease was $10,000 a year. Kendall had built, in comparatively recent years, a pretty good building on that property to house his seed store. I think that building was torn down in 1924, but I do not know what, if anything was paid or received for the wrecking of the building. That property likewise had a depth of 67 feet. My records do not show any contract preceding the lease of April 1, 1917, in reference to that property.

Taking Parcel 20, Ontario Realty Company, this property was leased to the Square Company July 1, 1912, for a ground rental of $11,500 a year on a 99-year lease. I don't know who were interested in the Ontario Realty Company. The Square Company took up the fee May 9, 1924, for $231,500, but I haven't the information as to whether it exercised an option or not. There were no tenants in the building. I do not have any knowledge as to what was received or paid for the wrecking of the building, which I think was torn down about 1924 also.

Measuring on the map, Exhibit No. 124 (on a scale of one inch to one hundred feet), the distance between the easterly limits of the Tower Building, as presently constructed, and the rear of the May property, Parcel 17 on the Square, is about 45 feet; in other words, the Tower Building now comes within about 112 feet of Ontario Street.

A photograph produced by Mr. McIntosh showing the corner view from the square was marked "Exhibit No. 126, Witness McIntosh," offered and received in evidence. A photograph showing the corner view from Champlain was marked "Exhibit No. 127, Witness McIntosh," offered and received in evidence.

Referring to the parcels which I have numbered 21, 22, 39, 40 and 41, in each instance the amount described as cost is the total amount paid for the property, and we have not allocated any part of the cost to buildings and excluded it from the amount shown on this statement. I can give you the seller's name and the amount paid for each one of those five parcels but I cannot tell you by whom they were purchased. I do not know where the title rests.

We acquired the leasehold of Parcel 21 on August 1, 1923, for $150,000, and that lease contained the right to purchase the fee for $270,000, which was done on October 1, 1923, making a total cost of $420,000, so that the first connection of the terminal interests with this property was on August 1, 1923, when they acquired an outstanding leasehold. I do not know when the lease was originally executed. The $270,000 paid was the exercise of the option in the lease.

Parcel 22, which is 40 feet on Ontario Street and 120 feet deep along Diamond Court, was acquired June 2, 1922, for $240,000 from the Sackett Estate. Mr. A. S. Taylor represented the seller, and it is my understanding that he is a relative of the Sacketts. There was no leasehold on that property; it was an outright purchase. There was no contract for that purchase that I know of, and I would not have the information as to whether there might have been a contract of a prior date as a result of which this purchase was completed.

We paid $213,621.70 on October 9, 1923, for Parcel 39, which is at the southwest corner of Ontario Street and Diamond Court, 23 feet wide. There was no leasehold on that property. It was an outright purchase of fee, and I don't know whether or not there was a prior contract for purchase.

Parcel 40 was acquired December 31, 1923, for $190,406.10 by the straight acquisition of a fee, there being no leases. This was one of a group of seven properties, the negotiation for which was completed by Mr. John D. Fackler, on behalf of the Van Sweringen interests, and Mr. A. B. Thompson on the part of all other interests. Of the seven parcels so involved, I can give you the ones on Ontario Street. There were four there, Parcel 21 was one of those, as was 39, 40 and 41.

An undivided half interest in Parcel 41, the Davis and Hunt property at the northwest corner of Ontario and Prospect was acquired on August 21, 1923, and the other undivided half interest on December 29, 1923, the net purchase price for the two or the whole parcel being $436,531.30. There has been no separation here so I assume it was an even division. I suppose these purchases were made from Mr. Davis and Mr. Hunt. The property was not owned by the Davis-Hunt-Collister Company, but was owned by the individuals. I do not know whether any contract existed prior to August 21st for the purchase of this property. I have pictures of the buildings on these last five parcels referred to. Parcels 21 and 22 are a five story and basement brick building.

(The photograph showing Parcels 21 and 22 was marked "Intervener's Exhibit No. 128, Witness McIntosh," and received in evidence.)

I do not know when the buildings on these five parcels were razed, I would think 1924. Prospect extended does not go through part of this property, but runs back and south of it. Calling attention to Parcel 42, Mr. Keller is one of my former partners. There was a lease on Parcel 42 and on Parcel 43 which were acquired by us, but there was no lease on Parcel 44.

Parcel 42 was leased for 99 years on September 1, 1917, to some Van Sweringen interest with an option to purchase at $215,000. For some reason the valuation of the building got in here. There were 25,788 square feet of building on this property, valued at $28,950. They exercised a purchase option June 25, 1924, and the building value was set up on the books in this particular instance. It is correct that $215,000 was actually paid for the property. There was some arbitrary allocation of the $28,950 for the building; who allocated that value I don't know, nor do I know how much the building brought or cost to raze. It was a Mayer Marks or Meyer Marks Furniture Store, five stories and basement brick building,

and was not of any value to us except the wrecking value, if we could get money from a wrecker for it. Sometimes we have had a wrecker to take a building down, but I do not know whether we were paid for it or not.

Parcel 43 had a lease on it made September 1, 1917, to Mr. Charles F. Brush as lessee, with a purchase option at $200,000, which was exercised September 25, 1924. There was a building value set up on this of $23,500 and the remainder of the $200,000 was allocated to the land, so that the land and building cost the Terminal $200,000 instead of $176,500, as set forth on this tabulated statement, Exhibit 123.

We had to appropriate Parcel 44, the court award being $83,000, of which $500 went to a tenant in the property, and there was $22,500 set up on the books for the building. It must have been an appraisal price, or testimony in the former case. They have not given me the date of the award, but July, 1924, sounds like it.

We did not pay anything that I know of to any tenant or owners of any interest in any of these properties shown as parcels 21, 22, 39, 40, 41, 42, 43 and 44 other than as I have stated. We did not get a deed from Walsh and McGuire for parcel 44; we just condemned an easement for railroad purposes, and all we got was what we received by virtue of the appropriation proceedings, for which we paid $83,000, $500 of which went to a tenant.

Parcels 45-A, 45-B and 45-C, which are not on Ontario Street, were leased in 1911 on a 99-year lease, by Sigmund Lederer, I think there being no purchase option in that lease. Having already acquired the 99-year lease thereon, on August 2, 1928, through negotiations for the purchase of the fee we acquired this Lederer property for $265,000. The rental value provided in that 1911 lease was $11,000 per year flat all the way through the lease. The depth of this property, 45-A, was 90½ feet deep to an alley, and that depth was used in figuring the square foot area. I should think there would be an increase in the value of this property along Ontario Street at this point between 1911 and 1928. That is 17 years. The reason for the increased price, however, or apparent increased price is that we were paying a ground rent of $11,000 a year. You would, naturally, expect to capitalize that at 6 per cent. We could not. We did not have any purchase option. They would not sell it at 6 per cent capitalization. It was the security they were after; they had no interest in the value; they had interest in the income. The lease was

worth something in 1928 with $11,000 rental; there should be an equity in it. The $265,000 was paid for the three parcels, 45-A, 45-B and 45-C, all Lederer purchases. Parcel 45-C does not appear to be on this map because it is not Ontario Street property, being back on Howe Avenue. This 45-A parcel referred to as having a 25-foot frontage on Ontario Street would not include also 45-B, 45-B being even a bigger lot than that, but I haven't the frontage here. In arriving at our cost per square foot we took the price we paid for the three Lederer parcels, but I do not think that we divided the total cost paid by the total area of the three parcels. There has been a separation here—building value of $17,000 deducted and then I think the remainder of the cost was charged against the two parcels, 45-A and 45-B. I think, and it appears from the memorandum which I have, that they overlooked charging any of it against 45-C. Apparently we have not a very accurate figure on the Lederer parcels. I think that is subject to correction. It is misleading to say that there was a lease value in there in August, 1928, that is not reflected in the total purchase price. The purchase price was a price negotiated by the lessee with the lessor, so any equity in the leasehold does not enter into that price at all. If I had a lease at a certain rental, which is based upon a deal made 17 years ago when the price of the property was not as great, I would probably be obliged by the lessor to take that into consideration in making my deal. If I were not the lessee I would buy only the reversionary rights of the lessor and then would go and deal with the lessee for a cancellation of the lease, if I wanted to get the entire fee. In this case, being the lessee I deal only for the reversionary rights and do not have to go out and buy the lease to obtain a cancellation.

A photograph showing parcels Nos. 40 and 41, marked "Intervener's Exhibit No. 129, Witness McIntosh," was offered and received in evidence. A photograph showing parcels Nos. 42 and 43, marked "Intervener's Exhibit No. 130, Witness McIntosh," was offered and received in evidence.

There was a 99-year lease of August 1, 1911, at a rental of $2,000 per annum, without purchase option, involved in Parcel 46, which lease was acquired by the Terminals interests at that time. They acquired the fee to that property August 29, 1928, for $50,000. There has been deducted from the cost as given on this Exhibit No. 123, $6,150 for a four-story and basement brick building,

so that the actual cost of this property was $50,000 and it was purchased on August 29, 1928, by the interests who had obtained a 99-year lease of it on August 1, 1911. The depth of that property was 90.5 feet.

Parcel 47 was also leased on October 1, 1911 by the Terminals interests at an annual rental of $2,200, without purchase option, and the fee was acquired on June 30, 1928, for $55,000. The depth is 91½ feet. The actual cost of that property was $55,000 instead of $49,150 as shown on Exhibit No. 123, $5,850 having been deducted for a building. I do not know what we paid or received for razing these buildings on parcels 46 and 47 nor when those buildings were torn down, but I think they must have been torn down before the fee was acquired. As to the theory by which I would reduce the cost of that property by an assumed value of the buildings which had been torn down before we acquired the property, the bookkeeping department had undoubtedly been carrying this building on their books at a value of $5,850. That is why I would get the deduction. In the other instances of leases which were acquired later by purchase, where there was no purchase option, for example, the Lederer property, 45-A and 45-B, the buildings were torn down during the running of the lease and before the fee was acquired, so that in this instance we likewise deducted for a building which had been torn down before we acquired the property.

A photograph of parcels 44 and 45-A, marked "Intervener's Exhibit No. 131, Witness McIntosh," was offered and received in evidence. A photograph showing parcels 45-B, 46 and 47, marked "Intervener's Exhibit No. 132, Witness McIntosh," was offered and received in evidence. A photograph of parcel 45-C, marked "Intervener's Exhibit No. 133, Witness McIntosh," was offered and received in evidence.

A part of parcel 42 and all of parcel 43 are the property upon which the Medical Arts Building is being constructed. It looks on your map (examining map) as if all of 42 is in the street. The Medical Arts Building would not be on parcel 44. That is the appropriated tract, the one we did not get a deed for.

Parcel 66 on Exhibit 123 had been leased to the Koblitz Brothers Realty Company by the Bradford Carter Estate, which was the owner, on a 99-year reappraisal lease, made on January 1, 1894, at a rental to be five per cent on a valuation to be fixed each ten years, with no purchase option clause. In July, 1922, the Terminals interest took the as-

signment of that lease, paying $60,000 therefor, but I do not know what rental was being paid at that time. The Terminals interest acquired the fee at the same time from the Bradford Carter estate for $150,000. I have put in on this statement only $150,000 as the cost of this property because the $60,000 was for the leasehold estate and building. I did not separate the leasehold estate and the building. The leasehold estate should have had some small value but it never was split up. I thought the building worth $60,000.

A photograph of parcel 66, marked "Intervener's Exhibit No. 134, Witness McIntosh," was offered and received in evidence.

I don't know that we paid $60,000 just for the building on parcel 66, as I didn't make this deal; I was not land and tax agent in 1922. As to whether I thought it proper to allocate the entire cost of these leaseholds made in 1894 on a 5 per cent basis to the building itself and leave nothing for the leasehold, I do not think a reappraisal lease is worth anything. You cannot sell a reappraisal lease. It has no market value, so I think the allocation is right, if you want my opinion. It is a fact that flat rental leases have had less than a sale value in Cleveland in the last few years; they have been a liability rather than an asset, so that there are some advantages in having a reappraisal lease, the advantage of having the difference between no liability and a liability.

A revision of Exhibit No. 123 in the third, sixth and seventh columns was marked "Exhibit No. 135, Witness McIntosh," offered and received in evidence.

The reason for a parcel known as 48 having been bracketed with parcel 42 in Exhibit No. 135 is that 48 is a parcel that does not front on Ontario Street but fronts on Prospect Street immediately in the rear of 42, across a 10-foot alley. The price of $215,000 for parcel 42 includes also the cost of parcel 48.

Parcel 63-A was a parcel on Ontario, improved with miscellaneous brick buildings, that was leased for 99 years from January 1, 1912 by The Ontario Street Land Company to the Van Sweringen Company, at a rental of $14,000 per annum, without a purchase option. I haven't the record here of which Van Sweringen Company that was, nor do I know who comprised the Ontario Street Land Company. The fee was acquired December 27, 1923, by the lessee from the Ontario Street Land Company for $280,000, so that the cost given here includes nothing for purchase of leasehold. It was simply extinguishing the lease and acquiring the fee. The 99-year lease was on a flat rental basis, and there

were no subleases to be bought out. There were some miscellaneous brick buildings on this property, which we carried on our books at $25,000. There was about 36,000 square feet.

A photograph of parcel 63-A was marked "Exhibit No. 136, Witness McIntosh," offered and received in evidence.

I do not know exactly when the buildings were destroyed, I think in 1924, after the fee was purchased.

Parcel 67 was the Higgins-Babcock-Hurd Building and was leased by the Higgins-Babcock-Hurd Company from Sarah Parsons October 1, 1906, for 99 years, at $4,000 per annum, the parcel containing 39,600 square feet. We acquired the leasehold estate and building on May 17, 1922, for $549,000 and on May 31, 1922, we bought the fee from Sarah Parsons or her successors for $90,000. I do not believe there was any option to purchase. This building was on the corner of Ontario, Huron and Vinegar Hill and Canal Road.

A photograph showing parcel 67 was marked "Intervener's Exhibit No. 137, Witness McIntosh," offered and received in evidence.

It is apparent that this photograph (Exhibit No. 137) was taken from the passenger platform of the Wheeling station. This is the plank platform in the foreground of the picture, and these tracks that are shown alongside of the platform are the tracks of the Wheeling, as indicated. I believe this Higgins-Babcock-Hurd Company property is now the site of the temporary wooden trestle that diverts Ontario Street, and I think Huron Road, proposed, certainly must cross it, and it also goes across the piece of property previously discussed, to-wit, parcel 63-A. This Higgins-Babcock-Hurd lease carried a flat rental of $4,000 per year for the whole period of 99 years from October 1, 1906.

Parcel 73, having a frontage of 120.13 feet on Ontario Street with a depth of 47 feet, was leased by the Walworth estate to the predecessors of the Wheeling, April 1, 1892. The fee to this parcel, together with the fees of parcels 74, 75 and 78 belonging to the Walworth estate and fronting on Ontario Street between this point and Eagle Avenue, was purchased October 26, 1927, as one transaction, from the Walworth estate the lessors, by the Van Sweringen interests for $550,000. There was no allocation of value to the different parcels in connection with this purchase. The lease of parcel 73 was a reappraisal lease, the property to be revalued every ten years, and is a part of the property covered by the contract involved in these pro-

ceedings made between the Terminals Building Company and the Wheeling. The present rental under this lease is $6,000 a year, starting April 1, 1922.

Parcel 74 was leased July 1, 1891, to the predecessors of Swift & Company, for 99 years, at 5 per cent of the valuation to be fixed each ten years, the rental in effect when the Terminal interests acquired the fee in 1927 being $4,400, per annum, which was fixed in 1921. The Terminal interests acquired the leasehold April 19, 1928, from Swift & Company for $130,000, including the building, leasehold, and a considerable amount of equipment, the kind of equipment that goes with a meat distributing plant, refrigerators and all the equipment with which they handle meat in a wholesale way, which they alleged could not be moved and used in any other plant and they made us buy it. To the best of my knowledge that equipment went with the building when it was wrecked but I do not know who wrecked the building nor whether we received or paid anything for the wrecking of the building, which was of no use to Terminals. There was a lease on parcel 75 made April 1, 1902, to the predecessors of Koblitz Brothers Realty Company for 75 years at 5 per cent, on a valuation to be fixed each ten years, plus $600 per annum, there being no purchase option clause in either the parcel 74 or parcel 75 lease. The leasehold on parcel 75 was acquired November 1, 1927, for $80,000 from the Koblitz Brothers Realty Company, there being no other consideration involved.

There was a leasehold of parcel 78 for 50 years from October 1, 1892, to the predecessors of Morris & Company at a rental of five per cent of a valuation to be fixed each ten years, with no bonus, the rental being paid when this parcel was taken over in 1927 being $4,500 per annum fixed in October, 1922. I think the rental in effect under the Koblitz Brothers lease on parcel 75 when it was taken over on October 26, 1927, was $3,800 and I haven't any information as to whether or not that included the $600 that started at the beginning. The leasehold on parcel 78 was acquired September 3, 1927, for $90,000.

I have allocated to parcels 73, 74, 75 and 78, the $550,000 that we paid for the fee to those parcels and also the amounts paid for the leaseholds, with the exception of the Wheeling, on a front foot basis, notwithstanding the Wheeling piece was 47 feet deep and the Walworth piece was 107 feet deep. Parcel 74 is 63 feet deep and parcel 75 averaged 90 feet deep. I did not do anything about adding to the Walworth parcel something for the leasehold, and I have

not allocated to the other three parcels something for the value of the leasehold. I have given you the exact cost to us of the leasehold estate, building and equipment. I have allocated to each of the four parcels a portion of the $550,000 fee price and have added in each case, except the Wheeling, the amount paid for the leasehold. The amount allocated to Parcel 73, subject to Wheeling's lease is $168,500. We have not bought the Wheeling leasehold and I have no knowledge of that contract to buy it. There is no notation in the table that the fee of parcel 73 is subject to Wheeling's lease. We bought the fee to those four parcels connected with the Walworth estate from The Cleveland Trust Company, trustee of the Walworth estate, and there had not been any contract for the purchase of these fee titles prior to October 26, 1927, other than a memorandum of agreement, made I think, some time in September, 1927, that was carried out by that transaction. Parcel 76 was bought in 1912 at a total price of $23,355.33, an outright purchase and no leasehold involved.

The following exhibits were offered and received in evidence:

"Exhibit No. 138, Witness McIntosh," being a photograph of parcels 72 and 73, constituting the Wheeling station as it existed in November, 1923.

"Exhibit No. 139, Witness McIntosh," being a photograph of parcel 74.

"Exhibit No. 140, Witness McIntosh," being photograph of parcel 75.

"Exhibit No. 141, Witness McIntosh," being a photograph of parcels 76 and 78.

These photographs shown were taken in November, 1923, with the exception of parcel 76 as to which my information is lacking. There was no leasehold on parcel 76, it being a straight purchase by the Van Sweringen interests for $23,355.33. As to how that price for this property, a 20 foot strip, was arrived at, I have an old history of the negotiations, that is the reason I think it was 1912, which says that the owners thought the land was worth a thousand dollars a foot, and the rest of it presumably represents the building.

Parcel 79, fronting 60 feet on Ontario Street, 126 feet deep, occupied by a three story and basement brick building owned by Dr. Frank Karl Felix was purchased about November, 1926, for $97,000. The doctor did not want the money so we paid him $27,000 and took a 99-year lease on

the other $70,000 at a ground rate of $4200 per annum with an open purchase option that we could come in at any time we pleased and buy it at the $70,000.

A photograph of parcel 79 was marked "Exhibit No. 142, Witness McIntosh," offered and received in evidence.

This property with that which we have just spoken of previously and some other to follow is right opposite the old market house, where for years people have come and backed up their wagons to the curb and handled merchandise on the sidewalk, and the improvements are old. The property in this neighborhood prior to this Terminal development was not regarded as having any great value neither prior nor since, so far as I know, certainly not prior. Parcel 81, the Y. W. C. A. property, was leased July 1, 1906, for 37 years at 5 per cent on a valuation to be fixed every five years. We acquired the fee early in 1928 from the trustees of the Y. W. C. A. for $72,100, and bought the lease March 17, 1928, for $41,500 from Mallum & Urbansky. One of the owners of the lease, Urbansky, was carrying on a wholesale and retail leather business in the property at the time.

A photograph showing parcels 79, 81 and 82 was marked "Exhibit No. 143, Witness McIntosh," offered and received in evidence.

Schildhauer was a tenant under Anne Walworth, ahead of Mallum & Urbansky. He forfeited his lease, but his name got on our records in some fashion. We did not have to pay him anything; he was gone. I haven't any history on parcel 82 at all, as properties south of Eagle Avenue are old purchases made back in 1911 and 1912. Parcel 82 is not south of Eagle Avenue but it was purchased with parcel 94 as one transaction and when it was bought about 1912 I think it was free and clear. I do not have any information on it other than that for the two parcels $145,000 was paid, and I do not know anything about there being a Walworth lease on this parcel 82. Parcels 82 and 94 were bought from the Walworth estate in 1912 and put into a corporation called the Walworth Land Company and the fee transferred to Sam Keller, who took up the fee and they agreed to pay him 6 per cent, with an open purchase option. The terminal interests bought the fee in the first place from Anne Walworth and put it into the Walworth Land Company, and then they turned around and sold the fee to Sam Keller and had the Walworth Land Company take a lease. Sam Keller is one of my old partners. I am quite sure there was nothing more paid in the way of con-

sideration over and above this $145,000 for which an option was given back to Keller.

Parcel 83 was owned by the trustees of the W. C. T. U., who leased it to the Terminal interests on September 19, 1911 at a flat rental of $6,000 a year with a purchase option at $100,000 which has been taken up.

A photograph of parcel 83 was marked "Exhibit No. 144, Witness McIntosh," offered and received in evidence.

Referring to map Exhibit No. 124, parcel 84 comprises the lot on the corner of Eagle and Ontario and the adjoining lot on Ontario as well as two lots on Eagle Avenue, four sublots in all. This property was owned by the Ives Estate and was leased January 1, 1918 to the Terminal Building Company, with an option to purchase for $212,500 which was exercised March 16, 1927.

A photograph of parcel 84 looking at the corner from Ontario Street marked "Exhibit No. 145, Witness McIntosh," and a photograph of parcel 84 from Eagle Avenue, marked "Exhibit No. 146, Witness McIntosh," were offered and received in evidence.

I did not have anything to do with the purchase of the Ohio Bell Telephone Company property and know about it only in a very general way as it was bought before my inauguration as land and tax agent. The Bell Telephone Company building was on the south side of Champlain Avenue, at the southeast corner of West Third and Champlain, but I cannot give you any information as to the price paid for that property that would be accurate at all. I will obtain that information for you. Exhibit No. 154 giving the cost of The Telephone Company property was later offered and received in evidence.

The gully or sloping off of the land toward the river that occurs back of the Wheeling property, toward Canal Street, in other words, in the block between Huron Road and Eagle Avenue, did not exist in connection with the property along Ontario Street between Euclid Avenue and Huron Road with the exception of the Higgins-Babcock-Hurd property, which sloped off toward the river going down toward Vinegar Hill but there was no gully from Howe Avenue. Therefore, the Terminal development necessitated excavation of all of the property between The Square and West Third Street and Ontario Street and Canal Road.

I do not know what the Terminal Company either paid or received in connection with the razing of the Diebold Brewing Company property, and to my knowledge nothing

was realized by Terminals from the extensive signal system of wires referred to by Mr. Boyd as being connected up with the central police station on Champlain Street, it being all scrapped in the excavation, and the same thing is true as to the signal system in connection with the fire engine house.

This property south of Eagle Avenue, between it and Central Avenue, was all obtained back in 1912 or theretofore, long prior to the announcement of the plans of the Terminal Company.

RE-DIRECT EXAMINATION by Mr. Boyd.

In reference to Exhibit No. 135 the prices under the column "cost" represent the total cost to Terminals Building Company and/or the Cleveland Union Terminals Company, whichever it may be, of each property, including lands and buildings and including the cost of any lease or leases that had to be purchased or cleaned up. Moreover, there were in some of the buildings equipment and fixtures which we were obliged to purchase.

Take for instance the Higgins Babcock Building, Parcel No. 67. That was completed about 1908, which would make it fourteen years old when acquired by us in 1922. It was five to seven stories in height, part of it full fireproofed and part semi-fireproof construction; built upon a six-foot steel and concrete floating foundation, tremendously expensive building in every way. The building occupied by the Mayer-Marks Company as a furniture store, Parcel No. 42, was equipped with elevators, offices and all the equipment which would go into a busy furniture store. It was an installment house, I think, and probably it did quite a considerable business. The building represented by Parcels Nos. 21 and 22 at the corner of Champlain Avenue and Ontario Street was occupied by The Brown Brothers Furniture Company, a large installment house, with a large business, equipped with office partitions, freight and passenger elevators, and was a good building in the interior. The Jefferson Building, Parcel No. 75, was not so good, it being a second-hand furniture house and the building was older than the others. The Davis & Hunt Building on the other corner of Prospect and Ontario had been in use as a hardware store for many years, was in good condition and supplied with a great deal of equipment, elevators, shelves, office partitions and the like. The Ives property, Parcel No. 84, was a six-story building at the corner of Ontario Street and Eagle Avenue, a rather old building. Taking

the buildings on Ontario Street from Euclid Avenue down to the Higgins-Babcock-Hurd Building I do not think there was a vacancy along the westerly side of Ontario Street until you got down to Howe Avenue. There were some pretty old and poor buildings south of Howe Avenue. The Swift & Company Building was a wholesale packer's distributing building of very substantial construction and in a good state of repair, not very old, and containing a lot of equipment that goes with that kind of business, such as meat hanging room, meat conveyors, trucks, carriers and complete refrigerating system and rooms. These were the fixtures which we took over in the sale. Parcel No. 78, the Nelson-Morris Building near Swifts, was of substantial and heavy construction, equipped similarly to Swifts although not so good a building. It was used as a meat distributing plant as well.

These buildings were acquired in 1921 and 1922 and not demolished until 1924 and every effort was made to keep them full until a short time before the time of destruction. In may cases we waited with the destruction until the leases had expired. We got salvage for most of the buildings but the particular price on any particular building I do not know as this was not in my department. When we had a property vacated we turned it over to the engineers and Mr. Jouett took care of wrecking from then on.

JOHN D. FACKLER, called as a witness in rebuttal in behalf of intervener, The Cleveland Union Terminals Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I am fifty-one years of age and reside at 2166 Sedgewick Road, Shaker Heights, Cleveland. I have lived in Cleveland or vicinity about twenty-seven years and am a lawyer by profession, having been admitted to practice in 1905. I commenced practicing in Cleveland and have always been an investor of real estate. Beginning in 1913 I was appointed by the Governor of Ohio as Deputy State Tax Commissioner and in that position made a complete revaluation of some of the suburbs of Cleveland and of the downtown area, that is to say, out to East 14th Street on Euclid and west to the River, north to the Lake and bounded on the south by 14th Street extending over to the district immediately east of Central Avenue. That territory in-

cludes all of the so-called Terminal area and a portion of the east approach, including the whole of Ontario Street for its entire length from the lake to Central Avenue where Ontario Street, a north and south street, stops. I spent the greater part of eight months in making the appraisement of that area with hearings where lawyers and taxpayers were represented in a discussion of these values. During that appraisement I came in contact not only with owners but with real estate operators and agents in connection with the fixing of values. This was the only official connection I had with the appraisal of real estate, but I had other experiences in connection with such appraisals. I am attorney for The Central National Bank and represent the bank in connection with its property matters as well as the President of the bank and the predecessor of the President. Beginning after my experience in the tax office I came out and invested a considerable amount of money, with others who advanced capital to me to buy properties, and since that time have been an investor.

My experience as an owner has been this: I bought my home on 115th Street when I first came to Cleveland in 1902. Later the first business property was on Superior Avenue near 115th Street. The next property was on Superior which is now Churchill, now owned by Mrs. Fackler under a ninety-nine year lease. She holds the fee and it is leased for ninety-nine years. The next parcel was a home in East Cleveland known as Rosemont Road. In 1912 I purchased a property at Saranac Road and 152nd Street, which I later sold, and at the same time one on Lorain Avenue and West 28th Street which was later sold; one at 152nd Street and St. Clair Avenue which I later sold; one at 152nd and Aspinwall Avenue, now owned by my daughter; one at Coit Road and Euclid Avenue which I later sold; and the property where I live in Shaker Heights. Then the property at the intersection of Huron Road and 9th Street and Prospect Avenue which we bought with Charles W. Hitchcock and his brothers. It is now owned in fee, unencumbered, 205 feet on Prospect Avenue. Then some time in 1915 the property at 500 Prospect Avenue where the L. & N. Company is. Then in 1917 the property on Prospect Avenue occupied by The Bing Furniture Company, which has since been subleased. Then in 1922 the property on Prospect occupied by The Bradley Furniture Company, sold two years later.

I am President of The Thomas G. Sloane Company and I just recently bought all its stock and its second

mortgage bonds. That Company has a six story building on the northerly side of Prospect Avenue next west of the Rose Building just west of East 9th Street.

I am President of The Carnegie Realty Company; President of The Anderson Realty Company; President of The Realty Corporation of Cleveland, which has just recently been organized. It owns no property but has money for investment. It has $2,000,000 authorized 6% preferred stock and 20,000 shares of no par common.

I have represented, and my practice in the law is now representing clients and others, not only in the capacity of a real estate lawyer, but as adviser in connection with the handling of their real estate. The extent of that interest might be shown by the fact that in 1923 and 1924 in the period of a year, when our activity was the highest, I paid real estate men commissions of over $150,000 in that year for my clients, for various deals and transactions. I never made a real estate commission in my life myself, however.

With respect to the location of my properties which I have enumerated on Huron Road and Prospect Avenue, with reference to Ontario Street and the Terminal area, they are all between Ontario Street and 9th Street. I forgot to mention that I recently bought $94,000 of the $107,900 of the first mortgage leasehold bonds of the property of The Schuster Company, which has a ninety-nine year lease on the southwest corner of 4th Street and Huron Road, which is very close to Wheeling's property, the bonds being secured by a pledge of the leasehold. The property consists of a leasehold covering 128 feet on Huron, 82½ feet on East 4th Street and a mortgage of the fee of the parcel next south on East 4th Street, having a frontage of 40 feet on East 4th Street and a depth of 100 feet, improved with a four story building. I bought those bonds from the Bondholders Committee at 60 cents on the dollar, demanded foreclosure and it is up for foreclosure. On the basis of my purchase of the bonds, the property, if no one bids above what I paid for the bonds, will be acquired for about $90,000, and the leasehold is $8,700 a year, which is 6% on $145,000. The lease and fee have been appraised for sale at the Sheriff's office for $122,000 and will be sold on May 31, 1929. That works out a value of about $15 a square foot for that piece of land. There are no other parcels that I am interested in except that this parcel at the corner of Eagle Avenue and Woodlawn Avenue, as adviser for The Central National Bank, I know considerable about that property and its value.

I have been called upon to act and have acted as arbitrator in appraising down town property for the fixing of rentals under long term leases. Mr. A. B. Thompson's office and my own adjusted the rents of the property on Euclid Avenue under the Superior Arcade without the necessity of arbitration, this particular property being on 4th Street at the corner. Back in 1920 I was the arbitrator there that fixed the rent under that lease. This property under the Superior Arcade is one of the most valuable parcels in the city and the rental was adjusted at $78,000 a year. I represented the Lake Erie Trust Company as arbitrator on its property at 16th Street and Euclid Avenue and have just recently completed representing the lessee in a reappraisal of the property under the Webb C. Ball Building on Euclid Avenue, next to the Cleveland Athletic Club. I am not a member of the Cleveland Real Estate Board but am Vice President of the Building Owners and Managers Association of the City of Cleveland and have been trustee for some years.

I know of quite a few properties that are for sale between East 9th Street and Ontario Street. You can imagine in a distressed real estate market, such as we now have, the amount of property that is offered, and there is considerable of it—distressed bond issues and distressed leaseholds that are in foreclosure and subject to forfeiture. There is property in this immediate neighborhood for sale. Just across from the Wheeling station is a property bounded on the west by Ontario Street, on the east by 4th Street and on the south by Bolivar Road, having a frontage of 135 feet on Ontario, a frontage of 74 feet on Bolivar Road and a frontage of 122 feet on East 4th Street. That property is for sale in fee at $250,000 and I am given to understand that it can probably be bought for $25,000 less than that, which would be about $25 a square foot for the land. There is a building on it of no value.

There is a property at the northeast corner of High Avenue and Ontario that is in partition which is for sale and has been for sale for some years. This property is immediately across the street from the new Medical Arts Building and has been held for a number of years at $250,000. It is not comparable with the Wheeling property, or in the same class. It is located where retail business is now coming and is in a district where you can put on an improvement and rent it for retail business and get rent for your space that would be far beyond what you could get in the Wheeling & Lake Erie district. The most valu-

able class of property in Cleveland is retail business and the least valuable is manufacturing or residence, probably residence. You grade from farm land to residence to manufacturing property to wholesale property and warehouses, and then to retail business property.

I have many clients who come to me with a question when they are either purchasing or disposing of their property, and they follow my advice not only on the law but on the economics of the situation. I have watched the rise and progress of the Union Terminals development and have represented owners who have sold their properties to the Union Terminals Company. I represented on Ontario Street an owner who seemed to have the best property of the lot, the one at the corner of the Public Square and Ontario Street, Parcel No. 17 as it is noted here. I organized The Square Company in 1916. Mr. A. B. Smythe and Mr. J. R. Sprangle were the Loop Realty Company and had a lease on that property at $18,000 a year. Mr. Smythe came to me and wanted to lease it at $24,000 a year. The rent looked very high, but it was earning $24,000 a year at that time from the rentals. We put up a hundred shares of Youngstown Sheet & Tube preferred stock so that that was all the chance we took on it, and Messrs. Hitchcock and myself organized The Square Company and took that lease and put up a hundred shares of Youngstown Sheet & Tube Company stock. Later, as The Terminal development came along, because of the very high rent of $24,000 a year that was being paid, although the property was bringing in a rental and income sufficient to pay that rent and pay a profit besides, because we had never been connected with a real estate enterprise that had failed, we were afraid we had better let go of that one, and we did, and when we got rid of it we had to take a lease in the name of The Square Company on the Mondel property which was the second door away on Ontario Street. So, we did take that lease on the Mondel property, and pledged the credit of The Square Company for that lease, and then disposed of the stock of The Square Company to the Van Sweringen Company. I think it was The Cleveland Terminal Building Company. This was about 1918 or 1919. It was at a time when the Mondel place was taken by The Square Company. That will fix the date. They were one transaction.

I did not figure in the sale of some half dozen properties to Terminal interests running along Ontario Street from Champlain out to Prospect. After the Maxa case on

the Square was decided the property owners on Ontario Street pooled their interests and employed Mr. A. B. Thompson to represent them and the Terminal interests asked me to represent them in the negotiations and see if it were possible to avoid appropriation proceedings on this property and I did that. The sale was finally made, the parcels being No. 18 the Webb parcel, No. 21, Nos. 40 and 41. I am not certain about 39. Then the property of the Cleveland Sand Glass Company, back on Champlain Street, and some property owned by the Pontiac Improvement Company in this neighborhood.

As to the effect of the coming of the Terminal improvement and its development up to date upon property values in that neighborhood, the announcement of the Terminal project excited speculation, as it always does, and the speculation overran the value. Now we are in a sag of values because speculation or anticipation always overruns the realization, and at the present time prices have settled to something like a normal position. But this district by reason of the Terminal development has been held from having as great a sag as some of the other sections of the city. But generally real estate in the City of Cleveland is in a period of depression which started in 1924 and has grown until I think perhaps there are more ninety-nine year leases, bond issues, and mortgages in default than there have been at any other previous time in the City's history. There has been some real estate activity in Cleveland since 1924 but not in any great development activity. There is always a movement in real estate, either on an ascending price scale or a descending price scale. There is never altogether stagnation. Except in certain outlying subcenters it has been on a descending scale since 1924, this being especially marked on outer Euclid Avenue and Prospect Street.

I have known the Wheeling situation for some time. While I was Deputy State Tax Commissioner I made a complete appraisal of the terminal facilities of all of the railroads to make a reclassification of their property as between lands and buildings used and not used in the operation of the utility, and I valued this particular property at that time in 1914 for tax purposes. [In valuing a public utility like a railway, the State Tax Commission, under our law, finds the total value of the utility by capitalization of the gross income, after deducting a certain percentage for the assumed operation. Then, getting that total value, they add the value of land and buildings not used in the

operation of the utility. That then gives your total value. Land and buildings not used in the operation of the utility are supposed to be on the local duplicate basis, like other people's land. Then they distribute to each taxing district, first the land and buildings owned by the utility, at the rate fixed by the county auditor, and approved by the State Tax Commission; formerly the Deputy State Tax Commissioner did that. Then the balance of the value is distributed in each taxing district in proportion to the number of miles of main track in each taxing subdivision. So that it is of vital interest to a community having terminal facilities like Cleveland, when they get an allocation of the total value of the utility, they get taxes on that. Otherwise, the railroad will have terminal facilities taxed out in low taxing districts having low rates. So that it is of some value, and that is the reason I made this complete reappraisal of terminal facilities, for the sake of informing the State Tax Commission, and we secured approximately $20,000,000 additional valuation for the city of Cleveland by that method. Not only that method of allocation, but by changing the location of classification of realty property, for realty property that is not actually used in the operation of the utility, but which they report as used escapes taxation.]

My own knowledge concerning the rule which prevails and has prevailed for the last 18 or 19 years under Auditor Zangerle as to the percentage at which real estate is valued, is that not only when I had that same task, but since that time, an effort has been made to carry land at its full value.

I have in mind the precise outline of the land owned by Wheeling on Ontario Street in fee and held under lease; also of the lands a portion of which will fall into the ownership of Wheeling upon the vacation of certain streets. I have appraised all this land. A plat was furnished me which I have checked with the description of the land as set forth in the application to the Commission, and I find the plat correctly represents the property as described in the option contract which is filed as Exhibit 11 in this proceeding. I have had no experience from actual transactions with so-called air right ownership and development. The only air rights outside of the Terminals which have come under my observation in Cleveland are those of the Cleveland Athletic Club where there is a lease above the plane of value, with the obligation of support and the right of entrance granted. I have studied the contract which was before the Commission in 1921, being the contract between

The Terminals Building Company and The Cleveland Union Terminals Company, and which among other things obligates the Building Company to provide for the Terminal Company a perpetual easement for the east approach.

I made a valuation of the Wheeling property in its entirety, all of its rights, not in segments nor in horizontal planes, because the parts totalled cannot be greater than the whole, and the question of the value of air rights is a combination of legal, engineering and land questions, and you would have to put your question in reference thereto so as to ask what the air rights would be worth assuming that you were given the right to build under certain particular circumstances. I cannot make a valuation generally of air rights any more than I could value a 99 year lease on this property unless I had all of the terms before me.

It is my business to keep posted and I think I am posted as to real estate values in Cleveland, particularly throughout the down town section, and in my opinion the fair market value of all of Wheeling's lands, in fee, including the leasehold interest to that part of the lands leased, and including also the assumption that, upon the vacation of such streets as Vinegar Hill and Huron Road and possibly a portion of Canal Road, reversionary rights belong to the Wheeling as a part of its property, the total value of that property is $814,000.

I arrived at the foregoing valuation by comparing Wheeling's property with other property in the neighborhood which is available. I took the land on Ontario Street on the south side up to the northerly line of the land held under lease from the Walworth Estate, consisting of 242 feet frontage on Ontario Street. I valued that at the unit value of $2000 a foot, and took 90% of that unit because the property is not a full 100 feet deep but is about 87 feet deep. This gave a value of $435,610. I took the Walworth lease and applied the same factor of value to that, to the land. There is 120 feet of front by 47 feet of depth. That gave a value, if it were an unencumbered fee, and exclusive of buildings, of $168,000. I arrived at the $168,000 on the basis of $1400 a running foot, which is 70% of $2000 a running foot. There is a ten year 5% reappraisal lease on this property held by Wheeling which cannot be sold and is not commercially valuable, for this reason: There are two elements in land value, one the economic value and the other the speculative value, both of which comprise market value. You cannot collect rent on anything but the economic value if you are renting to tenants, but in appraising lands your

appraisal and your testimony is always on market value, which includes economic value plus speculative value. Thus, in a 5% reappraisal lease you are constantly struggling against rising values which are usually liabilities, but I have given the lease one-sixth of the land value, allowing for a differential between five and six per cent money, because it is used by the occupier, and while it may not be marketable to anybody else, it might be marketable to somebody who was going to use it, but it would not be something that an investor would take. I think that makes $28,000, that is, one-sixth of $168,000, and I have added to that approximately $12,000 for the reason that the lessee under the Walworth lease has a right to occupy the property until 1932 at 5% on $120,000 which is less of course than 5% on $168,000. In that way I arrived at a total value of $40,000 from the Wheeling's lease exclusive of any land value. I took the land in the rear of the lease which is owned in fee and gave it the balance of the factor, that is, 120 feet at $2000 a foot, and taking 24.27% of it made $58,200 for the land immediately back or south of the Walworth leased land and an equal width therewith, to the southerly line of Wheeling's property, which is the northerly line of Canal Street. Then I took the balance of the land which is approximately 51,000 square feet extending from this land and constantly leaving Ontario Street to Eagle Avenue at $5.50 a square foot or a total of $280,500.

I am fairly familiar with the prices that the Terminals Company has paid for the properties it has bought on Ontario Street, Huron Road, what used to be West Prospect, Champlain and so on. In those, of course, a factor must be considered in taking those actual sales, due to the fact that it was a purchase by someone who had to purchase and no such purchase would be accepted as evidence in a court of law, as in Ohio, for instance, because the value of land is taken to be the price which the purchaser willing to buy but not compelled to buy will pay to a seller willing to sell but not compelled to sell.

Cross Examination by Mr. Hoppe.

I was advised in a general way of the prices at which other property had been acquired by Terminals, but they did not furnish me a schedule such as you have here in evidence, and nobody gave me those figures. I knew from my contact with the matter back in 1923 and from general information, about what this land was being acquired for. The prices at which those properties were acquired after it

was known they were wanted in this development should be discounted to a certain extent because of that factor, but not those acquired before it was known. I doubt whether very much property was acquired after the announcement was made from people who were ignorant of it because lawyers and real estate men were combing the district to get the opportunity to represent the various owners and lessees of this property.

I did not place any value upon the property which would accrue to the Wheeling by reason of the vacation of streets in the district, namely, a half of Canal Road and a half probably of Huron Road south of that portion of Huron Road that is colored in yellow as shown on Executive Committee's Exhibit No. 2 attached to Exhibit 48, and for this reason: A street gives access to the rear property and if those streets were vacated in their entirety you could cut off the southerly side of the property of Wheeling from access to Ontario Street by way of Vinegar Hill and you would have to provide that access in some way by giving it Ontario Street frontage or some other way of getting down to the rear of that property if you wanted to use the rear. It would cost considerably more money to build up the rear of Huron Street relocated than the value of the land you might acquire.

As to whether you could build up to Huron Road relocated and thereby have no cost of excavation for your basement, the steel work to carry your building up there would be much greater than the ordinary cost of excavating a basement.

The property Wheeling would acquire by the vacation of Canal Road would go to the center of Canal Road over to the line of Huron Road. I am not aware of any arrangements between Terminals and Wheeling for a division of this property which would revert. I have seen a map similar to Executive Committee's Exhibit No. 4 attached to Exhibit No. 48, but was not asked to appraise the property which is shown upon Executive Committee's Exhibit No. 4 which is outlined in yellow thereon. I made an appraisal for my own information and placed a figure upon the property outlined in yellow on Exhibit No. 4 of $1,374,796. The figure was divided up as between the building area and the so-called right of way area as follows: I took the frontage on Huron Road, which is 97 feet, and the frontage of 493 feet on Ontario Street, and I took the 97 feet for a depth of 100 feet at $2000 a foot. I took the 493 feet on Ontario Street at $1750 for 100 feet. Then I took

the balance of the area at $6.00 a square foot, the balance being 51,341 square feet after taking the frontage area. The appraisal of $6 per square foot included some of the property on Canal Road immediately behind the parcel 97 by 100 facing on Huron Road.

I am familiar with the location of The May Company which has a parcel on Euclid Avenue which runs through to Prospect and has an opening on Ontario between Euclid and Prospect, surrounding a parcel on the corner known as the Park Building. They are perhaps the largest department store in Cleveland and have a warehouse either on Superior or Payne from which they make deliveries, as they do not have to deliver the particular item of merchandise that you purchase in the store from the store. [They do not truck between the warehouse and the store. They do not indulge in any such wasteful distribution. I am somewhat familiar with the Bailey Company. They are located at the corner of Prospect Avenue and Ontario Street. I know Mr. Sincere who is a director of the Central National Bank and I know quite a little about their business. I do not recall the amount of business they do per year though I have looked at their statements. I would not say that they have the second largest business of any department store in Cleveland. I think Halle's and Higbee's (east of 9th Street) or Taylor's (which is between the Square and 9th Street) might do as much business as they do.] I am acquainted with Richman Brothers store on the corner of Ontario and Prospect and they do a very considerable business per year. The store is located from 800 to 1000 feet from Wheeling's property. The rentals in the Terminal Tower Building, depending on the space, are from $2.75 to $4.00 a square foot, I understand only from hearsay.

The rentals on the Medical Arts Building and the Builders' Exchange Building are distinctly different. Building may be asking from $2.75 to $4.00 a square foot for space in the Medical Arts Building, but the building that fronts on Huron Street would not get anything like that rent for garage purposes, because no garage could afford to pay rental comparable to office space. The garage building is built over Terminals' tracks. It is just across Huron Road from the Wheeling property. In making my appraisal of the Wheeling's property I considered that it is adaptable for a rather low grade of retail business or possibly a wholesale business that could have a track entry at the rear. That would be its best use. The

outlook for the property is certainly not as good as property directly across the street, because it has nothing in the territory south of it from which it can draw trade. The river is immediately south. There is no originating traffic or trade coming from that district. Any property across a street that has a dead area back of it will show a differentiation in value from a side of the street, like the easterly side of Ontario Street, which has surrounding it and on all sides of it a traffic originating area. Wheeling's property has a dead area back of it and would show a difference in value and, leaving out of account the topography of the land, would be less valuable because of this dead area. This is because Canal Street is down in the flats and because the river is adjacent there and there is not any passageway across the river. Traffic on the other side of the river has to go up to Eagle Avenue to get across on a ramp or it has to go down to the west of this property. To get from Canal Road to Wheeling's property traffic would have to go around to Columbus Street and competitors would get the trade before Wheeling's property got it. Immediately across Canal Road is the plant of The Cleveland Electric Illuminating Company and adjacent to that are the tracks of the B. & O. and adjacent to that is the river. There would be no people coming up from the flats or in that direction except as they go to and come from the industries that are in the flats. The Wheeling property has no background of traffic origination to support it. Huron Road as relocated is going to tap into the traffic as it comes across the Superior Viaduct, and the Central Avenue-Lorain Viaduct will bring a lot of traffic over there that now goes over the so-called Superior or High Level bridge. It is illogical to assume, however, that this will enhance land values at the bridge-head. It has not done it in the past; for example, the Superior Viaduct carries the main traffic, yet, the property at West 9th Street and Superior Avenue today is in distress. I have represented owners and distressed lessees between West 3rd Street and West 9th Street where nearly every parcel of property is in distress today. The bridge-head at West 9th Street carrying that immense traffic from the west side has not helped that property. That is not due to the character of the property. That property is a wholesale district and by bringing traffic by it you do not transform it unless it is pedestrian traffic that you bring by it. There was some good wholesale and retail business and some office space in that district and one very fine building

that excited speculation, just like the Terminals' Building excited some excitement some years ago in this district, namely, the Rockefeller Building, one of the finest office buildings in Cleveland. The tearing down of the warehouses on the south side of Superior Avenue by the Terminals Company did not have any effect because you had an open ditch on Superior Avenue. You could not cross into that district, that is from one side of Superior Avenue to the other until after you got West of Sixth Street. Before the Terminals Company moved into that district the retail district was moving out Euclid Avenue and was shifting. The property on Euclid Avenue and on Prospect Street from Ontario Street to East 9th and Prospect to East 14th and Euclid Avenue would be the present retail district.

Terminals proposes to bring into the depot about 300,000 passengers a day and most of the traffic will be pedestrian traffic. In valuing Wheeling's property I took this into consideration, but the fact is that pedestrian traffic is going to turn not to the neighborhood of Wheeling's property, but to the office buildings and the shopping district. It is not coming down to this district. If it were thought otherwise investors in real estate would be paying a good price to get property down there. I do not know whether the Cleveland Traction Stores Company is investing in property on the east side of Ontario Street. There is plenty of it they can still get if they want it.

In those sales in which I represented the owners and part owners of the May property, parcel No. 17, the Keyser-Webb property, the Skinner property, the Backus property and the Davis & Hunt property I considered the possibility of granting merely an easement to use the property, reserving the right to develop the air rights, but I would rather have the property without an easement, because with the easement you have a different engineering problem and have detracted from the value of the property when you put that burden on it. In this conclusion I made no study of what had been developed along those lines in other communities, but was in a general way familiar with the terminal district of New York. I knew that any easement or burden on real estate detracts from its value, and, of course, you must take the particular contract into consideration to determine how great it is.

The particular property at the corner of Ontario Street and the Public Square was in 1918 and until 1924, when it was torn down, the most valuable piece of property in the City of Cleveland per square foot, even more than

the property at 9th and Euclid. The piece at 9th and Euclid was a larger area. The property at Ontario and Euclid had 21 feet of frontage on Ontario and 67 feet depth and its value is based on its accessibility to use. 21 feet on Ontario Street and 67 feet on the Public Square was accessible to use and it was so valuable that the party who had the lease on the main part of the ground floor tore out the sides of the building so that people could come in and use it freely, leaving pillars standing. That produced more rent per square foot than any other parcel of land in Cleveland. That was a pop corn stand, and if you find the place of business in this city to conduct a pop corn stand that is your best value.

I do not see that the knowledge of Wheeling as to the use which was to be made of its property could have anything to do with its value. As to whether or not Wheeling's property could not be appropriated by another utility, I assumed that the Interstate Commerce Commission would not allow one railroad to hold up the progress of another unreasonably, and that, even if it could do so, that would not increase its value. The necessities of the purchaser do not make the value or the market. It might add to the amount, taking advantage of the necessities of the purchaser, I might ask for the property, but it would not increase its market value. While Terminals may hope to bring into that vicinity 300,000 people a day and Wheeling might tap into that flow of population, it could not do so without the consent of or making an agreement with Terminals. That stream of traffic is not disgorged under these plans at a point that will be of any benefit, so far as pedestrian traffic is concerned, to Wheeling's property. To determine whether the air rights over Wheeling's property would have value, you must determine where you would place your supports and what the nature of your rights in the ground would be to support any building that you would put above the tracks. For example, if the railroad necessities were such that, in order to support a building over this land, you would have to carry trusses or heavy steel work to span all of the tracks and would only retain as a part of your air rights the right to sink columns to carry that building on either side of the track, either to the north or to the south, the extra cost of doing that would be more than the cost of going across the street and getting a piece of land in fee without any easement on it. Assuming these facts, your air rights would be valueless. I heard Mr. D'Esposito testify that the burden for the de-

velopment of air rights upon land used for railroad purposes was in the normal case $25.00 a square foot, and in this particular case, assuming you spanned all the tracks, only $20.00 a square foot, but I can buy land across the street having better facilities for trade for less than $20.00 a foot in fee and as much connected with the flow of traffic from the Terminals' development as Wheeling's now is or ever will be. Even if the connection to Wheeling's property was underground by means of a tunnel, people would not go through a tunnel to go down there any more than they will walk on the sidewalk to go down there, because there is nothing to take them there. Persons having offices in the Medical Arts Building and patients would go through a tunnel to get from the passenger terminal. As to whether this would be true if the Medical Arts Building were built upon the Wheeling property, I think that any one who would build that building on the Wheeling property would go busted, for he could not bring persons down that far, as they would not go through that much tunnel to get there, the distance being something like 250 feet. A distance of 20 feet can drop values 50%. I do not think the various buildings connected underground with the Grand Central Terminal are more than a thousand feet from the train exit, the Yale Club, for example, being about 400 feet. The Roosevelt and the Biltmore are quite close. I took into consideration the element of value that would inure to Wheeling, particularly by reason of the terminal development. Property directly across the street will be equally affected and if I thought there was going to be any great addition to values I would buy it tonight at $18.00 a square foot and I have the money to buy it if I thought so. In valuing Wheeling's property I did not discuss with anybody the possibility of spanning the tracks and developing the air rights above.

[Real estate values became inflated following the war and I had thought they had declined since until I heard the values testified to yesterday when I thought they had started the other way. The decline has not applied to certain business centers, such as Lee Road and Cedar and Lee Road and Kinsman. They are the only ones I know of particularly which have not had the recession. But even 105th Street and Euclid, which is a sub-business center, has had a recession in value; also Warren Road and Detroit. There has been a recession in values along the Shaker Rapid Transit line through Shaker Heights within the past few years. I sold a lot back of my home for $16,-

800 cash in 1924 which I could buy back for three or four thousand dollars less today. It is within 500 feet of the Rapid Transit and in the best residence section in Shaker Heights. Houses there show a recession, although less than the rest of the City, from 20 to 40%.

In 1916 A. B. Smythe and J. R. Spangle who held a lease on parcel No. 17 at Public Square at a rental of $18,000 a year with an option to purchase for $300,000, subleased the property to The Square Company for $24,000 a year with the option to purchase the fee for $400,000. About 1918 we wanted to sell our lease to the Van Sweringens. They would not buy it but we did make a deal to take in the property of the Kendall Seed Store and took that lease in the name of the Square Company; then they said they would buy the stock of the Square Company, which they did buy but didn't pay for until some three or four years later. The Square Company held a lease on the May property and the Kendall property, the May property at $24,000 a year and the Kendall property at $10,000 a year 21 feet away. The Van Sweringens also bought the stock of The Loop Realty Company in 1921, securing the same from parties who were financially involved, so that the total cost to the Van Sweringen Company of the sublease and its rights and stock, including 100 shares of Youngstown Sheet & Tube stock, worth $10,000, was about $70,000. They acquired the property and the lease of the Loop Realty Company and had the right to buy the fee for $300,000.

I acquired a property on March 2nd of this year on Prospect between East 9th and Ontario. I bought all the stock of the Thomas G. Sloane Company and the second mortgage bonds; the latter at a sufficient discount to pay for the stock. The Terminals interests are not interested in either The Carnegie Realty Company or The Realty Corporation of Cleveland. I did not act for Terminals in the purchase of any other property than those which I have told about.]

Adjournment.

May 18, 1929.

[Mr. Boyd: Ordinance No. 48344 was passed by the Council of the City of Cleveland, December 30, 1918, in anticipation of the adoption of the initiated Ordinance No. 47814, which is already in evidence. It was an expression by the Council prior to the initiated

election held one week after the passage of No. 48344 of its intention to amend the initiated ordinance, when and if the same was approved by the vote of the people. The said initiated ordinance having been approved by the vote of the people on January 6, 1919, thereupon, on January 27, 1919 the Council passed Ordinance No. 48426, which is likewise already in evidence, and which served the purpose of carrying out the Council's declared intention as expressed in Ordinance No. 48344, herewith offered in evidence.

Ordinance No. 48344, marked Exhibit No. 147, Boyd Counsel, was received in evidence.]

STANLEY L. MCMICHAEL, called as a witness in rebuttal in behalf of the intervener, The Cleveland Union Terminals Company, being first sworn, testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I have resided in Cleveland since 1905, am 49 years of age and my occupation is a realtor with offices located at 1222 Prospect Avenue close to East 12th Street, where I have been located for the past nine years. I operate as The Stanley McMichael Organization, not incorporated. During the past eight or nine years I have had as high as 26 brokers operating out of my office. My first connection with real estate was from 1907 to 1911 as Real Estate Editor of the Cleveland Plain Dealer. During that time I covered Cleveland and the entire county in the sale and leasing of property and recording the news stories regarding the same. In the fall of 1911 I became Secretary of the Cleveland Real Estate Board, then having a membership of about 50, and continued until 1919 when I left the Board to enter business, the Board then having a membership of about 1200, the second largest real estate board in America. I was the Secretary of the Valuation Committee of that Board, which during nine years, I estimate, made appraisals of $49,000,000 worth of property. It was my duty to sit in the meetings of the Committee, obtain information regarding different properties, the fee and rental, and prepare a report for submission to the officers for their signature in connection with the various reports of appraisals. This brought to my notice and under by observation the appraisals made by the various members of the Committee and the Committee as a whole, many scores of them. There were nine members of the Valuation Commit-

tee of the Real Estate Board, three being elected each year for three year terms.

In 1919 I opened a general real estate broker's business, devoting my personal attention largely to downtown properties but operating in connection with properties throughout the City. By downtown property I include the area from East 22nd Street on the east to Cuyahoga River on the west, Lake Erie on the north to Central Avenue on the south. I am still a member of the Real Estate Board and was a member of the Valuation Committee for three years, 1923 to 1926. As a member of that Committee I was called upon to appraise 25 or 30 properties per year. We get mostly large appraisals on that Committee and do not go after small appraisals.

As to property which I have handled during the period from 1919 to date particularly in the downtown district, I leased the Premier Building to Dr. Bishop on 18th Street near Chester Avenue. I sold the site to Mr. Josiah Kirby for the Kirby Building, now the Guarantee Title Building on Superior Avenue just west of 9th Street. I sold the corner of Oregon and East 12th Street and the property to the County on Lakeside Avenue, near East 9th Street, just east of the County Morgue. I made a number of leases to chain stores along Euclid Avenue, in the 100 per cent district, rentals ranging from ten to twenty-five thousand dollars a year on ten year leases. I made a ten year lease to a shoe store in the Union Mortgage Building on Euclid Avenue just west of East 9th Street, at $28,000 for five years and $30,000 for the succeeding five years.

I made another store lease on Euclid Avenue midway between 6th and 9th Streets, and a ten year lease the other day on the north side of Superior Avenue directly across from the Cleveland Hotel. The Cleveland Hotel is located on Superior Avenue directly west of the Public Square, and forms the northwest part of the depot development, being the only piece of property left in private ownership in the area southwest of the Public Square included in the terminal area. I made a number of smaller deals throughout the district in the past two or three years.

Because property has been so dead in that territory for the past three or four years I have not accepted any listings for sale or long term leases. I have not had any inquiries or requests for it. I have a number of acceptable chain stores on Euclid Avenue and am working on two or three deals, one on Huron Road west of 9th in the Fleischeim Building. I have six store properties for lease on

Euclid Avenue and am working on a property just east of the Williamson Building on Euclid Avenue extending from Euclid to Superior Avenue involving two and a half million dollars. I am also negotiating with the owners of the Nottingham Block for that property just east of this property on Euclid Avenue and extending northerly from Euclid Avenue through to the alley, with a very large concern wanting space therein. But most of my activities for the past two or three years have been leasing properties to chain stores, because they have been about the only people in the market for downtown property.

During my real estate experience I would say that the southerly side of Euclid Avenue extending from East 4th Street to East 9th Street represents the peak of real estate values, the Taylor Department Store property being about in the center. The elements entering into and contributing to high real estate values are buying pedestrian traffic, accessibility of buying pedestrian traffic to property, the size and shape of property, the condition of the buildings thereon, whether of a character that they have no value and one would not be put to the expense of removing them, the character of the neighborhood, by which I mean the presence in the neighborhood of large department stores or merchants who draw business to that particular territory and transportation facilities. These elements appear most prominent and available in the district along Euclid Avenue from The May Company on the Public Square extending easterly to East 14th Street.

In the last twenty years there has been a business expansion rather than a trend of business from one point to another. There have been five distinct shifts or expansions in Cleveland. In 1907 business through the growth of the city expanded on Euclid Avenue easterly to 12th Street or a little beyond Halle Brothers. In 1917 or 1918 expansion forced business in Euclid Avenue to Play-House Square along 14th Street, where during the period of two or three years no less than six theaters were grouped within a distance of five or six hundred feet of each other. The development of this theater district resulted in a more active store district and store rental values kept pace with this traffic in the theater district. That was an expansion and not a shifting because lower Euclid Avenue has never gone down but has maintained its values throughout, which is shown by the fact that the chain stores, perhaps the best students of real estate values among all buyers of facilities of that kind, demand a location in the district between the Public Square and Euclid Avenue and East 9th Street.

In reference to the May Drug Store corner at Ontario and Public Square, we have a peculiar traffic situation in Cleveland in that practically all diagonal thoroughfares start at different points in the city, somewhat in the shape of a fan with the Square as its hub, and traffic diverges in all directions with the result that in the mornings and evenings there is a tremendous flow of pedestrian traffic to the Square to secure car service to different parts of the city. From the period of 1915 to 1924 that corner was the busiest traffic intersection in Cleveland. Right at this May Company Drug Store many thousands of people congregate to board cars from four to six o'clock in the evening, and this in a measure contributed to the heavy pedestrian traffic at that point, as it was the heaviest transfer point for street car passengers in the city. Today, due to diversion of traffic lines to other points, it is not as heavy.

Ten or fifteen years ago when there was a very active public market on Ontario Street about opposite Eagle Avenue, the market drew a great many people from the street car lines on the Public Square, but not the type, however, who patronized high grade department stores. The easterly side of Ontario Street at its best was what might be termed a small business trading street with a great many foreigners on the easterly side going to and fro on the railroad lines. The May and Bailey Companies also drew a large number of people but only to points of entrance to those stores, not extending southerly on Ontario Street. The westerly side of Ontario Street had a lesser volume of traffic except to some stores, like the Davis, Hunt, Collister's large and important hardware store. South of that there was a very visible falling off of trade, there being only one or two furniture stores, and just south of that was the well-known "flop house" district where it was really dangerous for women to go at any time because of the great number of bums collected there. As a result there was no buying power there, rentals were low extending for more than two or three blocks south on Ontario Street and the district was very dilapidated.

Going farther to the south beyond Central Avenue and prior to the time when the Nickel Plate and New York Central went in there with the high level freight development, the territory was thickly populated but it was Cleveland's most conspicuous slum district, inhabited almost entirely by foreigners who were succeeded later by colored people. In the last few years in which the railroads have been building their freight houses and other developments

up there the entire district has changed from a residence district of a very low grade into a freight yard district and there are practically no residences from Ontario to East 9th Street today. There is only one grade of business of any consequence being conducted up there on the southerly side of Broadway, namely, that of food merchants, and this is gradually being shifted to 37th Street along the Nickel Plate which is in the neighborhood of a mile easterly from East 9th Street and Central Avenue.

I am the author of what I call the Realty Library, a collection of six books ranging from about 400 to 448 pages on real estate subjects. The first book was written in 1921 and is entitled "Long Term Leaseholds," having gone through two successive editions, and being later called "Long and Short Term Leaseholds." I also wrote the book "How to Make Money in Real Estate" for the use of investors, which was followed by a book known as "City Growth and Values," being a study of observations on the growth of cities and a consideration of the unique real estate problems encountered in connection with growth wherein values are created or detracted from. I published another book known as "Selling Real Estate" and I am also the editor and publisher but not the author of a book known as "Principles of Real Estate Appraising" by John A. Zangerle, County Auditor of Cleveland and the foremost appraiser in America. I published a book known as "Financing Real Estate." I sell about six thousand of these books a year and they have been sold in thirty-six foreign countries, being used as texts in a number of universities and either as texts, collateral reading or in the libraries of sixty-five universities conducting courses in real estate. They are also being used by about two hundred real estate boards in various ways in connection with educational courses, Y. M. C. A. courses, etc.

I have known Wheeling's property in Cleveland ever since coming to Cleveland in 1905, and have given it particular notice during recent months. I have examined it and studied it with reference to appraisal, having gone over the whole property very carefully both above and below. Its only particular element of value is based upon its proximity to the downtown business district and the most valuable use to which the property could be put whereby it would earn the greatest return would be as a possible site for a store building two or three stories in height, fronting on Ontario Street. The basement would be useful for storage, and extending back on the level of Ontario

Street the space could be suitably developed for wholesale business. If the building cost was not prohibitive, a development of that kind would create a larger return than any other. The topography is one great thing which interferes with the use of the property advantageously. It would be very expensive to develop. There is practically no level land and the side banks go down a matter of fifty feet to Canal Street and would require a tremendous expenditure for steel and that kind of thing in building a building, and it would make it difficult to earn a good return on that account.

I have familiarized myself with the plans for the construction of the east approach to the Union Depot over that property. Assuming that such approach would be so constructed for the operation of trains by electricity, I do not believe the upper levels or air rights could be profitably developed due to the excessive costs that would be involved in the construction of the building. I have familiarized myself by examining the maps, as well as the contracts for the land owned in fee by the Wheeling, as well as the leasehold interest owned by it, and I have seen the layouts of the proposed streets and of the actual streets.

My total valuation, arrived at after a good deal of study, of the total property of the Wheeling, including all the land owned by it in fee, including the leasehold interest to the land covered by the lease, and including the interests in Vinegar Hill, Huron Road, and Canal Road, to the extent that if those streets were vacated by the city, that the ownership thereof to the extent of the middle of the street immediately adjoining would fall into and become the property of the Wheeling as adjacent owner, as of July 3, 1928, is $828,843.73. I have divided the property into four tracts, as follows:

Tract No. 1—A frontage of 235 feet along the westerly side of Ontario Street, extending southerly from the projected extension of Huron Road, west from Ontario Street, and having an average depth of 75 feet. On that property I placed a valuation of $415,010, on the basis of $24.12 per square foot for approximately 17,200 square feet.

The second tract I appraised was that portion of land lying in the rear and to the west of the Anne Walworth property leased for 99 years to the Wheeling. Tract No. 2 is approximately 120 feet along its easterly line paralleling Ontario Street, and is approximately 36 feet deep, containing approximately 4,320 square feet, and on that prop-

erty, which is in the rear of the leasehold, I place a valuation of $53,529.92, or $12.39 per square foot.

Tract No. 3 comprises an irregularly shaped area containing approximately 53,260 square feet of land lying directly to the south of Tract No. 2, and being part of the former right of way of the Wheeling, together with slopes, banks, and so forth, fronting on Canal Road, and extending to Eagle Avenue. On that property of 53,260 square feet I placed a valuation of $319,560, at the rate of $6 per square foot.

Tract No. 4 embraces the land under a 99-year lease, fronting on Ontario Street, directly south of Tract No. 1, and has a frontage of approximately 120.13 feet, with an average depth of 47 feet. I gave to that leasehold a valuation of $40,743.81. I gave the leasehold a valuation because it has three years to go, 1932, before there becomes effective another reappraisal. The one basic rule of valuing a leasehold is to determine the difference between its benefits and its burdens. The size of the land is 120.13 feet front by 47 feet deep. I gave in this case a unit valuation, 100 feet deep, of $2,000. I used the unit depth rule used by scientific appraisers in determining the value of the 47 feet, and the unit is 70.10 per cent. $2,000 times 70.10 per cent. gives a value per front foot for 47 feet of $1402. $1402 times the 120.13 feet of frontage gives the value of this land in fee interest at $168,422.26. This is at a rate of $29.83 per square foot for approximately 5,646 square feet, if figured in feet.

Leases in Cleveland today are made and calculated on a 6 per cent. interest rate. Six per cent. on $168,422.26 gives an annual rental of $10,105.33. This particular lease provides a rental for the next three years of per year $6,000. Therefore, the profit per year for three years on this lease is $4,105.33. The present worth on future rental tables, for an annual profit of $4,105.33, requires that this amount be multiplied by a factor of 2.673, from one of the many tables ordinarily used in matters of this kind, indicating the annual profit for the next three years to be the sum of $10,973.54. This lease, however, is subject to reappraisal in 1932, from which time it extends for a period of 62 years. Let it be assumed that under a reappraisal three years hence the arbitrators would give the same value to the premises as I have done, thus eliminating the profit of $4,105.33. Nevertheless, it is a 5 per cent. lease, so it is apparent that the lessee has an interest to the extent of

one per cent. for 62 years. Under a new 6 per cent. reappraisal the rental would be per year $10,105.33. Under a 5 per cent. lease the rental would be per year $8,421.11. Annual profit to the lessee, therefore, would be $1,684.22. Apply to this the one per cent. factor, worth of future rentals, for 62 years, $1,684.22 times 17.676, profit for 62 years, or $29,770.27. Add the profit for the three years, until next reappraisal, of $10,973.54, which would give a total of $40,743.81, which is my estimate of the value of that lease.

CROSS EXAMINATION by Mr. Taplin.

I have been sitting here at these hearings all week, waiting to testify at the request of the Terminals Company, and I have heard all that has gone on before as to what the different real estate men and what the engineers have said about this property, but this appraisal was made some weeks ago at the request of the Terminals Company. A list of the number of sales in the neighborhood was submitted to me in typewritten form. I went over a large number of leases, many of which were 99-year leases, and other data and combined with that a general knowledge of the territory and the prices that have been paid for property in that neighborhood during the period of the last ten or fifteen years. I heard Mr. McIntosh testify regarding a list of prices paid for parcels of land, which was put into evidence as Exhibit No. 123, but that is not the list which was given to me. The list given to me contained some of those; Parcel 44 seems to be the first one I have, the cost of which he gave me as $22,500 for the building and $60,000 for the land. He did not give me Parcel 43 nor Parcel 45A; the next one is 66, which is 70.38 feet on Ontario by 170 feet deep along Howe Avenue and contains 12,041 square feet. It was owned by the Bradford-Carter Estate and was leased January 1, 1894 to the Koblitz Brothers Realty Company, by assignment, at 5 per cent valuation to be fixed each ten years. The property was improved with two four-story and basement brick buildings containing a total of 42,840 square feet, which were appraised at and purchased for $60,000 in July, 1922. The fee was purchased in July, 1922 also for $150,000, which is $2,104 per foot on Ontario without regard to corner influence, or $12.45 per square foot. That seemed to be a sale, and I considered the $210,000, the total of $60,000 and $150,000, as the value of that property in relation to the property which I was appraising at the time I appraised it, and to some extent I based my appraisal

of the Wheeling property on the values that were given to me in this statement by Mr. McIntosh.

Density of pedestrian traffic is one of the most important elements in value of downtown real estate, and I think that in one of my books referred to I covered that situation as being one of the most important elements to be considered in determining value. The character of pedestrian traffic has a lot to do with the buying power. There might be a great many people going to a railway station or a boat station, who do not have buying power like you would have on Euclid Avenue. Mere pedestrian traffic does not have the value we used to think it had. People going to railroad stations or boats are what we call pick-up trade. They will pick up a loaf of bread, groceries, and newspapers, and so forth. I know something about the proposed development of the concession area in the Union Station and that extensive provisions are made in connection with that concession area. That will be a pick-up proposition in that instance where people will pick up groceries, bakery goods, newspapers and so forth, and possibly something of a greater character, for example, like men's furnishings. I have passed the stores in the Grand Central Terminal in New York City, but I do not know that there is a very large volume of business done there. I have observed the character of that business and in my opinion it is just of a pick-up character for the most part. I think the character of business done in stations is of the general type I have mentioned. If there were quite a large number of people selling men's furnishings in the Grand Central Station, $2,000,000 per year would not be a great volume of business. If one store did it, I would say that was a considerable volume of business for one store. I do not know how many stores there are in the Grand Central Station, but I do know there is a large development over the tracks outside of the station all along Park Avenue running up from 42nd to 51st Street of stores, apartment houses and what not. They are very high buildings and are very heavy structures put upon those air right spaces.

I do not believe the Cleveland Union Terminal development will to any degree match the Grand Central Terminal development of New York City, and have not given that consideration to the extent of thinking that it is going to be in Cleveland what it has been in New York. I believe the Cleveland Union Terminal Station is built to take care of 300,000 people per day. If I were told that the Grand Central Terminal was originally constructed to take care of 200,000 people per day and this Cleveland Terminal is now being

constructed to take care of 300,000 people a day, I would take into consideration the fact that the maximum volume of business in this station was calculated to take place 25 or more years from now, and it is not estimated that anything like 300,000 people a day are going into that station when it opens, or within the next several years. Furthermore, I made my appraisal of this land as to its market value as of last year, and not some problematical future time, when something else may develop. When I appraise a piece of land I do it to some extent in the light of a development in the neighborhood which is in process of being carried to completion, and simply because a development is not completed I do not fail to give consideration to the ultimate effect thereof.

I did not take into consideration in appraising this property the estimate of 100,000,000 passengers per year, or 300,000 for an average week day, handled by the Cleveland Railway Company at this time. One cannot assume that it is all going into the station, and if it all does go into the station, it won't have the visible effect on this particular property which you seek to impose upon it. It is the appraiser's duty to appraise the value of the property as of a certain time. Any value accruing thereafter is not imposed on the property, beyond the time you make your appraisement, beyond a reasonable expectation. I gave no consideration to a possible development on the Wheeling property and of buildings in the terminal area and the terminal station, not believing it had anything to do with the matter. I did not, in considering the appraisal of this property, give consideration to circulars put out by bond houses in Cleveland containing letters from the terminal authorities in connection with the sale of land trust certificates and bonds of the Terminal Tower Building. As a real estate man, I am naturally interested in appraisals that go on in connection with properties such as the Terminal development, and I think I saw one of those circulars several years ago, but I cannot recall the facts now, nor do I know specifically what Mr. Bradley stated in any of those circulars. I know they were quite enthusiastic but enthusiasm has nothing to do with the value of property. If the statement that the station also provides tracks for rapid transit and that the study made by the Cleveland Railway Company as to the probable number of local passengers who must inevitably pass through the Terminal Tower Building to and from the carrier's Union Terminal Station indicates that very early in the initial operation of the station there will be about 100,000,000 passengers per year handled, or

300,000 for an average week day, were made by Mr. Bradley, as President of Terminals Building Company, in July, 1928, it would have no effect whatever on my appraisal, any more than the effect of the fact that 50,000,000 people come off the San Francisco ferry and go up Market Street in San Francisco, where the lowest type of structures are within two or three blocks of the depot, and those people, of course, directly pass the property, and they will not pass this property by several blocks.

I am familiar with the fact, as a real estate man, that there has been some business depression throughout the country for the last several years, and there has been a slump in real estate values. In speaking about a re-routing of cars from the time there was the greatest congestion at the May corner, at the Public Square and Ontario, I referred to the scattering of traffic to the corner of Champlain and Ontario, Prospect and Ontario and Huron and 4th Street. There became such a congestion at Ontario and the Square that it became necessary to re-route these cars in sections along Ontario, East 4th and Prospect, in order to take care of the congestion around the Square. That would scatter pedestrian traffic along Ontario Street, up Prospect to 4th, probably some of it to Huron and 4th, and possibly to High Street and 4th, where for some time there was a temporary line, which was operated for some time, but I do not know whether it is now or not.

The Wheeling depot was in the dangerous old flop district up on the west side of Ontario. I did not say that it was in such a dangerous district women could not go there to take a train. They would walk up the east side, which was perfectly safe, and practically all the women did. They avoided the west side of Ontario up to Vinegar Hill, because there were a lot of bums standing around there all of the time. The terminal development will not, in my opinion, bring back to the Square and Ontario District the retail stores which have been scattering on out Euclid Avenue, by bringing all the traffic from the east and west sides into the terminal area. It will probably affect their expansion farther east. There is only one important store development in the depot, and that is the proposed department store, fronting on Ontario Street, between the Public Square and Prospect, if they succeed in getting a tenant for it. It has been offered to every big store in America and nobody has taken it. I do not believe any other important retail business will be conducted in that area. There may be some shops, but I do not believe they will be important. I know that there has been some fear for some months among

the Euclid Avenue store people about this terminal development and that it is going to take the business away from them and put it back at the Square, but I do not know how pronounced it has been. I saw reports of a letter to the public put out by the Euclid Avenue Association asking people to withhold deposits of Cleveland Railway stock until some more investigation could be made of the property. I doubtless know that the merchants on Euclid Avenue are very much concerned over this terminal development and the possibility of it taking business away from them, but I do not know to what extent they are concerned. I do not believe it is going to hurt the people on the upper part of Euclid Avenue but there is a difference of opinion regarding that. If a store such as Higbee's or Halle's should be located on this site in the terminal area, some of the people coming into the terminal area will walk right by that store and go on up Euclid Avenue and trade at Higbee's or Halle's. It is a principle of psychology, speaking particularly of women, who do 80 per cent of the buying in department and retail specialty shops, that they almost invariably visit several stores, and I do not believe that merely because this proposed big store is located there, everybody coming into and out of the depot is going to that store to buy something. They will no doubt look in the store and compare its values with other stores and, so far as they can readily purchase something at this store the same as the others, to that extent they may patronize it, but that is no reason why it is going to be a tremendous success. I understand from men connected with other big department stores in that city, who have given me this figure, that it will necessitate a store going into that depot which can do some $30,000,000 worth of business a year, which is practically as large a volume as the largest department store in Cleveland is now handling at the present time after many, many years of building up its trade. This $30,000,000 is estimated as the amount of business per year the store on the Square must do in order to clear expenses, operating expenses, and make a reasonable profit on its stock. I understand the May Company does between twenty-five and thirty million dollars business a year. That is the biggest store in Cleveland, and an entrance to it from Ontario Street is directly across the street from the site in question, but that is not the main entrance to the main building of the May Company. It was the entrance to the May Company store many years ago before they expanded onto Euclid.

It would not these days be an advantage to a large department store to have freight facilities right at its back door and have the freight elevated right into a storage warehouse connected with its property. Trucking would be just as cheap and just as preferable as railroad cars in the basement. The May Company is trucking from a railroad station to a warehouse. If they had desired, no doubt they could have had a switch from the Wheeling or some other railroad, to bring freight cars into the sub-basement of their store. If that would require a good deal of tunneling and would be an expensive piece of construction, so would it be to do this. Somebody must pay for it. If the ground is all scooped out there, to build the building costs money. I do not believe there is any advantage in having railroad freight delivered right into a building over having it delivered to a railroad station from which it has to be trucked to the warehouse. I do not know whether the Terminals Company would make arrangements for the delivery of freight within this terminal area. I understand that no freight, however, is to go into the entire area. It is a terminal passenger proposition. I know where the Wheeling comes into the Terminal area, and I heard the testimony of Mr. Jouett that it was not intended by the terminal people to use what might be called the tail-end of the Wheeling property down toward Canal and Eagle. Even if the development goes forward as planned, I would not consider it a possibility to have freight brought in from the Wheeling right of way a few hundred feet necessary to go into the building with a warehouse attached, across Eagle Avenue. Even though it were connected by subway to the Medical Arts Building and the terminal carriers, I believe as a business venture, a department store there would be a wreck inside of a year. I am not so sure about the Medical Arts Building and the garage building. The buildings are there, but that doesn't say they will pay 6 per cent on their investment in the next 15 years.

In making this appraisal I used the map furnished me by Terminals, known as Executive Committee Map No. 2, attached to Exhibit No. 48 in this proceeding. I was not given Executive Committee Map No. 4, attached to Exhibit No. 48. As to whether I appraised the property outlined in yellow on Executive Committee Map No. 4, attached to Exhibit No. 48, I remember just a short time ago that one of the appraisers had been working on a different set-up, and for my own information I projected my valuations on the same per foot value and per square foot value and made an estimate of value of the No. 4 set-up, giving considera-

tion to the fact that Wheeling would have a frontage of 97 feet on Huron Road going back to a depth of 166 feet at right angles with Huron Road, as extended. That changed the basis of my calculation. I was asked to appraise the property held in fee simple and leaseholds, and this new map contains quite a large additional amount of square foot area. I placed an estimate on this property outlined in yellow on Map 4 attached to Exhibit No. 48, for my own information, of $1,466,107.62, using a per unit front foot value on Huron Road extended of $2,000 and $2,000 on Ontario Street all the way through, a distance of 492.83 feet. The basis of the estimate just given varied from the basis of my appraisal previously referred to in that it gave a great deal of additional depth to the extreme end of the property which has now switched around from having a frontage on Ontario to a frontage on proposed Huron Road relocated of 97 feet and 160 feet deep. It also gave me a difference in frontage on Ontario Street from that I originally figured on, that is, the portion south of the leasehold. I believe any benefits obtained by considering as the Wheeling property that outlined in yellow on this map No. 4 attached to Exhibit No. 48 would be offset by the additional burdens of having to go down that slope for a greater depth and out into that area away from Ontario Street, which has a level stretch, and build a building. The topography of the property would offset any additional value that the greater area might give it, so that, in my opinion, the property of Wheeling is not any more valuable for air right development than is the property outlined in yellow on Map No. 2, and I think the same elements I have stated as to the matter of desirability of this property would apply just the same to this new piece to which we are just referring. I have given nearly one-half million dollars additional value because of the additional size. Beyond that I don't believe it has anything in desirability or available use that the other one would not have.

[In valuing the leasehold estate of Wheeling I assumed that for the ten years beginning 1932 the arbitrators would give it the same value as I have done, to-wit, $168,422.26. I cannot project it more than for one ten year period. I cannot tell what change there may be. It may go down. I cannot project an appraisal any farther than three years. I did have to do it to get my figures there. I raised the appraisal after 1932, increasing the rental from $6,000 to $10,000, giving you a $4,000 increase, but beyond that I can not go. That is, for the next ten years. It may be lower than that later on and probably will be in my opinion. The ap-

praisal is made on the basis of the value of the property, unimproved, at the date of the appraisal. I do not believe that a reappraisal is necessarily a compromise figure which is generally below the normal value that would be placed on the property. As a general rule that has not been the experience in Cleveland. I think that in most reappraisals they have got the full economic value—not speculative value—and that is the basis on which property is sold these days.]

I agree with Mr. Fackler that value includes both speculative and economic values but the whole system of selling real estate is changed. Up to the general collapse of the speculative era of three or four years ago property was sold on the basis of what you could get for it, but today it is sold primarily on the basis of what it will earn. More property downtown in Cleveland changed hands on the basis of ninety-nine year leases and the speculation arose out of making these flat rentals instead of reappraised rentals. I don't believe there are any advantages in having a reappraisal lease instead of a flat term lease made during a speculative era. I would not accept a reappraisal lease as a gift. Reappraisal leases cannot be financed, which is always essential in connection with property development. They are a total loss and being changed over as rapidly as possible. There were about eighty reappraisal leases made in Cleveland in the 80's and 90's and I understand many have been made over with a renewal clause at either a flat or grade rental. They are of value neither to the owner, the lessee or the lessor.

I have studied the development of the terminal areas in other cities besides Cleveland but have never written anything about air rights over railroad terminals. It would be impossible to give an opinion on the value of air rights in any particular instance without knowing the cost from an engineering standpoint of utilizing the air rights. I do not have such cost figures in this case but am as well qualified as any other real estate man I have heard in these proceedings to state what the value of air rights would be over Wheeling's station. Although I have not had the engineering data and cost figures I have discussed the matter with engineers and I am somewhat familiar with it.

RE-DIRECT EXAMINATION by Mr. Boyd.

Cleveland's surface street railways do not carry as many passengers today as they did ten years ago, the number carried having been decreasing for the past seven or

eight years due to the automobiles and rapid transit. As the city grows larger people take other means of transportation, particularly the automobile. Sears-Roebuck built a large store about a year and a half ago on Carnegie Avenue where there is a tremendous flow of traffic, so tremendous as to be a great detriment to the street. The volume of traffic on Carnegie is greater than any other thoroughfare in the city. There is practically no pedestrian traffic at the Sears-Roebuck plant and I have heard discussions to the effect that the Sears-Roebuck people are not satisfied with the volume of business they are doing there and that it is confined very largely to Saturday afternoons when laboring people in their cheap automobiles drive over there; but the rest of the week the traffic is comparatively small because it does not cater to the traffic going by that point which consists of people living in the high grade residential areas to the east and southeast. As further bearing out the fact that the enormous volume of traffic on Carnegie Avenue is a detriment to the street, four years ago property was listed and being sold on the basis of $800 to $1,000 a front foot out in that neighborhood, and today it can be acquired on a basis of 20 per cent less, or $600 a front foot, between 79th and 89th Streets, right in the neighborhood of Sears-Roebuck store and west thereof it can be purchased for as low as $400 a front foot down to 22nd Street which is the westerly end of Carnegie Avenue. The property there is a drug on the market. I would say that the stores along Carnegie Avenue, particularly the Sears-Roebuck store, has intercepted very little automobile traffic flowing over Carnegie Avenue from the Heights section of Cleveland. Carnegie Avenue has a total volume of somewhere between 30,000 and 35,000 automobiles per day and is the natural thoroughfare from the Heights section, one of metropolitan Cleveland's best residential sections.

The majority of concessions about the Grand Central Station in New York are food, soft drinks, cigars, fruits and to a lesser degree, haberdashery stores.

JOSEPH LARONGE, being first sworn as a witness in rebuttal in behalf of intervener, The Cleveland Union Terminals Company, testified as follows:

DIRECT EXAMINATION by Mr. Boyd.

I am forty-seven years of age and have resided in Cleveland all my life. My business is the purchase, sale

and appraisal of real estate and the building and developing of various types of properties. I have been actively engaged in that business for twenty-eight years and am now head of the Joseph Laronge Company, a corporation, and subsidiary companies. We have been operating as a corporation since 1912 but prior thereto I operated individually. During the past twenty-eight years my real estate activities have included everything realty-wise from subdivision work to the sale of downtown properties, the leasing of property, the making of store leases, the planning and erection of various types of buildings, the making of mortgage loans and such other kindred lines as may be incident to the operation of a realty business. During lean years the volume of such business has been as low as four or five million dollars, up to fifty million dollars in good years. At the present time in an abnormal situation we have fifty-five to sixty regular employes in our main and branch offices. Our main office is in the Union Trust Building in Cleveland at the corner of Euclid and 9th Street, a twenty-one story building with the greatest capacity of any office building in Cleveland. We have a branch office on West 117th Street and another at Cedar and Lee Road in Cleveland Heights. Our operations have covered all classes of property in every section of Greater Cleveland. I have had considerable experience in real estate appraisals, the last large appraisal being an analysis made for a Chicago bond house with regard to the desirability of the erection of a large family hotel on the West Shore at Cleveland on Lake Drive. Halsey-Stuart are the concern which wanted to come into Cleveland and they were asked to loan between a million and a million and a half and wanted an analysis made to cover the feasibility of the venture. We have made appraisals for mortgage loan companies, banks and individuals as a check upon properties submitted to them and which they were desirous of purchasing through other sources. The field of our activities has covered practically everything from vacant lots for residence purposes and residences to almost every type of property but particularly business property. I have been a member of the Cleveland Real Estate Board for about sixteen years.

During the past ten years Cleveland's real estate market has been checkered and during the past four years has been at a low ebb, although now somewhat improved. The downward trend was due to both general and local conditions, the latter including failure of mortgage companies

which took from the field the necessary financing to make deals possible. There has been overbuilding also ever since the war, which is a potent factor in holding down values. We have done quite a bit of investigation work, such as that done for Halsey-Stuart Company, and have bought and sold hundreds of properties annually in Cleveland and its suburbs.

During the past two or three years the peak of real estate values in Cleveland has been the territory on Euclid Avenue bounded on the west by 4th Street and on the east by 9th Street. The peak front foot value has been from $12,000 to $25,000 starting with inside values and graduating upwards to corner values, these being based on unit depth. The peak value of $25,000, in my opinion, is at Euclid and 9th at the Union Trust Building situation because of the flow of traffic there, the large building and the great number of people to enter and depart each hour of the day. At 4th and Euclid are the chain stores, Woolworth's, McCrory's, Cunningham's, The Ames Company, and a little to the west, the Stone Shoe Company and other chain stores. Those are the large ones.

The May-Little parcel at the corner of Ontario Street and the Square has increased constantly in value over a period of years as the pedestrian traffic increased at that point and as the city grew, and there is no other property on Ontario Street, either north or south of the Square, comparable to it in value, except the Park corner immediately across Ontario on the east corner which has an equal value.

Population, growth, transportation, type of buildings, usability of property and traffic conditions give real estate its highest value, but vehicular traffic which merely passes by adds nothing to value except as an advertising means, perhaps, for automobile concerns and such like which want people to know what they have to sell. Pedestrian traffic, such as shoppers for necessities, adds certain values, as for example in Cleveland suburban areas where values have been increased on that basis up to $800 to $1,000 per foot. There are occasional shopping districts such as 105th and Euclid where there are ladies' and men's ready-to-wear stores. Then we have the downtown section where the greatest amount of shopping converges because people go where the largest stores are located and where the greatest variety of buying is made possible.

Coming now to an enumeration of my real estate activities and transactions in Cleveland's downtown district west

of East 22nd Street to the Cuyahoga River and from the Lake across to Central Avenue and starting on Lakeside Avenue, we made a survey for The May Company and located its garage and warehouse on Lakeside Avenue. We handled transactions at: West 2nd and Superior; West 3rd and Frankfort; part of the site under The Ames Company establishment on the south side of Euclid Avenue; the Republic Building on Euclid through to Vincent; the Star Theatre Building on Euclid west of 9th; part of the Union Trust site at 9th and Euclid; a six-story building at the corner of Prospect and 4th; an eight-story commercial building to the rear of that on 4th; a parcel 100 feet on Huron Road and 50 feet on Prospect at the corner of Prospect and 6th; part of the Taylor tract on Prospect, formerly known as the Mid-Arcade; a parcel on the south side of Prospect known as the Kohler property; The Ohio Bell Telephone Company site on Huron Road; the same Company's site at the corner of Huron and 8th; The Morris Plan Bank site on Huron Road just east of 9th; the Medical Center Building on Huron Road east of 9th; 1610-1614 Prospect Avenue; the northeast corner of Prospect and 18th; the Ohio Theater and Loew's State Theater site on Euclid at East 14th with about two acres of ground behind it; the southeast corner of Euclid and 18th; the 1900 Euclid Building on Euclid Avenue; the northwest corner of Euclid and East 21st Street, 166 by 440 feet; the Colonial Theater on the north side of Superior just west of 9th; the property at the junction point of East 12th, Superior and Payne on the west side of 12th Street; the property on the east side of 12th Street opposite the Statler Hotel between Chester and Euclid; the property on East 18th Street between Chester and Euclid, and on 21st, 23rd and 25th Streets between Chester and Payne.

We also handled transactions covering the property on Payne, St. Clair and Superior Avenues including the H. Black plant, one of the largest textile plants in the territory, between 19th and 21st Streets; the property on Central Avenue between Ontario and 9th including the corner of Central and 9th; the property on 9th at Sumner; the property on 9th at Wigman; the property of the Evangelical Publishing Company comprising the city block from 19th to 21st on Woodland Avenue; a large parcel sold within the last year and a half to the Shell Oil Company, having railroad, river and dock frontage; the site of the Mall Theater immediately east of the Square running from Euclid to Superior; the property on the north side of

Euclid adjoining East 13th, now occupied by Woolworth's; the property on Hamilton Avenue just at the new Public Auditorium between 9th and 6th, and many other properties within the general downtown area.

These transactions embrace either sales or long term leases known as 99-year leases. In addition I have leased many large and small retail spaces in that territory starting at the Public Square and going out to East 22nd Street, to concerns handling almost every line of merchandise, including leases at the corner of Euclid and 9th to concerns like the Eastman Kodak Company, Kruppenheimer, United Cigar Stores, Walzer Shirt Company and the like. I have sold properties at 9th and Wigman, 9th and Sumner, Superior and 9th, Huron and 6th, Prospect and 6th, Walnut between 19th and 21st, Huron and 4th, Eagle Avenue and 4th. I can mention several others, if you want them.

As to property now on the market for sale between East 9th Street and the Cuyahoga River, I might mention the northeast corner of Huron and Ontario and the corner of West 3rd and Superior, the latter immediately across from the Terminal; also several parcels on the north side of Superior immediately adjoining this corner. I might also mention manufacturing or industrial tracts on the River starting at Front Street and going as far as Commercial and Harrison and that territory south of Ontario.

The parcel at 6th and Huron starts at the southeast corner of 6th Place on Prospect running through to and fronting 100 feet on Huron Road. The Huron Road end is improved with a one-story building with foundation sufficient to carry two or three more stories. The parcel embraces about 20,000 square feet, is held under 99-year renewable lease at a maximum rental of $26,000 per year effective in 1936. The lease is available with building or buildings thereon at $200,000. The buildings are now producing about $45,000 a year rental, and capitalizing the highest rental, not effective for a number of years, on a 6 per cent. basis gives a value of $450,000 or $20 a square foot.

I have observed and kept track of the progress of the union terminal development and have noted that, since the depot has been assured and actual construction commenced, values have increased materially on Prospect Avenue eastward from Ontario Street. There has been considerable inquiry for the acquisition of fees and long term leases and for rental space. Speculatively there has been more or less of a demand for property on Huron Road because

pedestrian travel which will come from the station will probably find its way eastward largely on Euclid and Prospect and perhaps in a measure on Huron Road. Notwithstanding the depression of the last two or three years, which is still with us, the Prospect Avenue frontage between 9th and Ontario has practically doubled in value. Huron Road is in a transitory state and is not enjoying the increase in value that Prospect is having. Huron Road property, however, is today in the eye of the market at about $1,500 to $3,000 per foot as a fair average, between Ontario and 9th. The property next to the Bell Telephone Building site on Huron Road, 160 feet in depth, on the corner of an alley or court on one side and with an alley in the rear, sold to the telephone company for between $3,200 and $3,500 a front foot inclusive of buildings. These buildings, consisting of a fair four-story building and a good two-story building, were suitable for the operation of printing presses, heavy machinery and so on, but for the Telephone Company's purposes were only scrap. This sale was completed last summer.

A development such as the terminal development has a helpful influence on values reflecting not only to downtown but to the suburbs east and west. In my opinion the greatest reflection comes at a point east and west rather than downtown. With the completion of the work under way and getting down to the Wheeling property on the south side of Ontario between Huron and Eagle Avenue and eliminating the factor of terminal undertakings, and superimposing that now on the territory, I would say that the development has more than doubled the value of Wheeling's property.

Coming now to the area from Kingsbury Run to Woodland Avenue and from Central Avenue to about a mile easterly therefrom, the population has left this area because of the wreckage of the buildings which were there and the removal of tenement houses and cheap hotels. In place of this population and buildings we have freight depots and the like almost from East 9th Street up to 34th Street and the terminal development at 37th to 40th Street around the Nickel Plate. There is work under way looking toward an entrance to the depot along Ontario Street by Eagle, Huron, Harrison and the like, and there is the new illuminating power plant at Canal Road. There is the old market house in the open space across from Wheeling's depot, a little to the east, which I understand is to be eliminated.

I made a particular investigation of Wheeling's property and appraised it within the last two months. The outlines of the property are shown on Executive Committee's Exhibit No. 2 of Exhibit No. 48. I have had no experience in the actual disposition of property having air rights attached to it except in an endeavor to sell such property, and the only one I know of in Cleveland which is offered for sale is the C. A. C. Building, which with the exception of the terminal I believe is the only air right property in Cleveland. The C. A. C. Building has eleven stories built by virtue of air right ownership and my memory is that everything above the fifth floor, or possibly the fourth, is air right. We have tried to sell that property for five years. We have attempted to sell the property with air rights and have found it difficult because purchasers do not want to be subject to those air rights. We have endeavored to sell the property coming within the air right area and could not, upon an economic basis, figure out a return sufficient to pay the price which had been set upon it. In other words, the actual brick and mortar cost so much that the return upon the investment is inadequate except for a special purpose such as a club.

Taking the Wheeling property and divorcing it entirely from the idea that Terminals must build there and considering it free from any such influence and viewing its reasonable prospects for the future, I have superimposed upon at least a part of that area the only type of improvement which in my opinion would be feasible for that tract of land, either at this time or for some years to come, namely, at a maximum a two-story building devoted to commercial space on the first floor and to office space of the cheaper type on the second floor, a type of office space where partitions are not required and where a large unit of space would be wanted for use as telegraph offices, railroad offices, architectural offices and the like. Considering the size and topography of the property this, in my opinion, would represent the highest and best available use thereof. Assuming that the terminal project crosses the Wheeling property with eight or nine tracks, and that the air rights were to start on the level of Ontario Street, I would certainly think that an improvement could be put there which would answer the type of improvement just described, and if you could go down twenty feet below Ontario Street you would have basement space available. An air right lease, therefore, which gave to the lessee all such rights starting twenty feet below Ontario Street level and

going up toward the sky would, in my opinion, have some value and would be available for the two-story development or twenty stories if it were thought advisable and justified. While it might be available, either at the present or some future time, for a theater, hotel or other structure, I cannot conceive, speaking positively and in most certain terms from my theatrical experience, of any circumstances under which, because of its topography, a theater would be possible.

My computation of fair market value of Wheeling's property as of the early part of July, 1928, assuming the Wheeling property to be as shown on Executive Committee's Map No. 2 attached to Exhibit 48, including the leasehold estate, is $700,023. I arrived at this figure as follows: The entire street parcel north of the leasehold estate, having a frontage of 240 feet with a depth, used for the purposes of my computation, of 75 feet, is figured at $1760 per front foot, or $420,000. The leasehold estate is figured at $11,000 and the parcel in the rear of the leasehold estate, having a frontage of approximately 120 feet on Canal Road by a depth which for this purpose was taken at 35 feet, at $47,023. The remaining parcel lying to the south, computed as 55,500 square feet, was valued at $222,000, making a total of $700,023.

CROSS EXAMINATION by Mr. Taplin.

The figures as to the volume of my business were based on sales prices. I am appearing as a witness in behalf of Terminals at the request of Mr. Boyd and Mr. McIntosh and have been waiting all week to testify. Mr. McIntosh first approached me to make an appraisal of Wheeling's property several months ago so that I might testify in a case about to be called in the United States Court at Cleveland. Prior to being engaged by me to appraise the property I gave him no idea of what I thought it was worth. I don't operate that way.

I did not attempt to compare the May property with any other corner property, but I did say on direct examination that in my opinion the peak values were somewhere between 4th and 9th on both sides of Euclid. The May property is 21 by 67 feet and the small size of the property in a highly congested district is a great factor toward establishing its value, especially when it has a lot of street frontage easily accessible to pedestrians. A piece of property at the northeast corner of Euclid and 9th, limited in size to 21 by 67 feet, would in my opinion be as valuable as the

May property. Except in the appraisal for the terminal interests of the Diebold Brewery property, I have never represented the terminal interests, nor have I sold or leased any of their properties or purchased any properties for them. Some time ago I sold a piece to them in the terminal area between 37th and 40th Streets, and some years ago on the Nickel Plate at the east end, one piece to the United States.

The territory surrounding the Telephone Building is not a retail district but the Telephone Building itself does bring large numbers of pedestrians to that district who go there to pay their telephone bills. It is true that there are hundreds of employes in that building but this is not the class of pedestrian traffic which seeks to buy merchandise.

My testimony in reference to the uses to which the Wheeling property could be put was directed not only to the parcel covered by Map 2 of Exhibit 48 but also to Map No. 4. The property shown on Map No. 4 would have a much greater value than the property on Map No. 2 but the uses to which either property could be put would be the same. Assuming that the air rights over the Wheeling property begin at twenty feet below the level of Ontario Street, the additional area shown on Executive Committee's Map No. 4 has a greater amount of level land than that shown on Map No. 2. It would not require as great an expenditure in the creation of a sub-structure on the area shown on Map No. 4 as it would on the area shown on Map No. 2, but if you consider the surface and subsurface rights to a distance of twenty feet and limit the use of a building which has in its requirements not more than twenty feet of basement space, the air rights are as valuable on one parcel as on another except as to the extra cost of construction made necessary by the contour of the land.

I have put a valuation of $1,441,843 on Wheeling's property as shown in yellow on Map 4 of Exhibit 48. As to the changes in my basis of calculation in arriving at that figure as compared with the figure given for the property which I originally appraised, I quoted $1760 per front foot for the 240 foot parcel having Ontario Street frontage. That figure was arrived at by using the unit of $2000 per foot for a 100 foot depth. I used the same unit in connection with the parcel on the other exhibit but it increased slightly the foot frontage that I finally resorted to in my calculation because the average depth is greater. The square foot basis for the land which has no Ontario Street frontage is the same, $4.00 per square foot. The $4.00 per

square foot value applies to the 55,500 square feet at the southwest corner of the property, that is, at the corner of Canal Road and Eagle Avenue, sometimes referred to as a right of way parcel. It starts from the fee and lease line and goes south of that. I gave added value by virtue of the fact that there was 97 foot frontage on Huron Road extended, which gives a straight depth there of around 160 feet, taking that into consideration by computing it as Huron Road frontage and not as Ontario Street frontage, and fixing the value at $2,000 per foot, the same as Ontario, and taking the entire width of the parcel starting with that fronting on Huron Road and extending to the other end of the property, the Ontario Street frontage, which would give an average depth of 126 feet. I used the figure of $2,000 per foot for 492.83 feet by 126 feet, for the average depth, and applied the regular table to it which gave me more than $2,000 a foot. Whatever additional value, if any, accrued to the Huron Road parcel, which for my purposes has a frontage of 97 feet on Huron Road proposed or extended, was figured in the entire computation of 2187. Put another way, I reduced the frontage on Ontario Street having less than 100 feet and increased the frontage on Huron Road having more than 100 feet.

I arrived at the $11,000 valuation of the leasehold estate as follows: I allocated no value to the lease as such beyond the present ten-year period expiring in April, 1932, although upon some methods of computation some value might well have been given to it. I figured that land on the basis of $2,000 for the unit foot, and reducing that figure on that basis gave me a value of $173,000 for the leasehold parcel, if held in fee. Capitalizing that at six per cent gave me a rental value of $10,350 per year, or $4,350 per year more than that which the lease now provides for. This resulted in an excess rental value for that period of about $13,000, the present day worth of which reduces the amount to approximately $11,000. I have not made any study of air right elements such as have gone on in New York City, Chicago and Philadelphia, but have made observations in my capacity as a real estate broker.

The Cleveland Union Terminals Company rests.

Raymond T. Cragin was called as a witness in rebuttal on behalf of applicant, and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Martin.

I reside at 1904 East 87th Street, Cleveland, am in the real estate business with offices in the Williamson Building, Cleveland, and am forty-one years of age. I have been in the real estate business in Cleveland twenty-two years, specializing in industrial and commercial property, representing corporations and estates. I have been President, Vice President, Chairman of the Board of Trustees and a member of the Valuation Committee of the Cleveland Real Estate Board. I have been Vice President of the Ohio Association of Real Estate Boards and for about ten years was on its Executive Committee. I have been Vice President and a director of the National Association of Real Estate Boards.

I have taken part in the leasing, buying, selling and appraisal of properties in most of the downtown Cleveland area, such as the Central National Bank Building on Euclid Avenue, the Osborne Building at Prospect and Huron, the northwest and southeast corners of Euclid and 18th Street; the northeast corner of Prospect and East 18th; the Ohio Bell Telephone Company site on Huron Road; a parcel on Bolivar Road, all of these being leases or sales. On Ontario Street just south of Prospect I made the original lease to what is now the Walworth Company, and represented the Walworth Estate for a number of years which owned about thirty properties in the downtown district, four of which were on Ontario Street south of Huron, and others on Canal Road on 4th Street south of Huron, on 9th Street at Central, etc.

My representation of the Walworth Estate and my general familiarity with lands in downtown Cleveland have made me entirely familiar with the land in the neighborhood of Wheeling's property northerly of Eagle Avenue. Among other occasions I at one time was retained by twenty-one property owners having twenty-three properties in the so-called terminal area facing on Ontario, Superior and the Public Square and the streets in the rear thereof, in their negotiations with Terminals. A number of the Walworth properties which I mention as being on Ontario Street were up for reappraisal or readjustment of the lands under existing leases and I handled some of those matters. I have also had special occasion to be familiar with Wheeling's property. Four of the Walworth parcels which I handled in that estate were parcels listed in Mr. McIntosh's Exhibits 123 and 135 under the name of "Walworth," and one of them is included in the Wheeling property.

About 1921 I was retained by Mr. Duncan, then President and now President and Chairman of the Board of Wheeling, to appraise that and other properties. I think that appraisal was the northerly mile of the Company's lands in Cleveland. Shortly afterwards, representing the Walworth Estate, I negotiated the new rental for the current ten-year period under the lease which has been referred to in the testimony here as the leased land of Wheeling. At various times since 1921 I have made studies and reports to the Wheeling in connection with these particular properties, and in 1925 and 1926 I made an exhaustive study of all the Cleveland and Cuyahoga County property of Wheeling in connection with federal valuation matters.

I handled the federal valuation of the lands of Erie, Pennsylvania and Wheeling in Cleveland, and also the Pennsylvania outside of Cleveland in certain Ohio towns and cities, appraising properties along 250 route-miles of these various railroads, most of which mileage was in metropolitan district, and had an aggregate frontage of 500 miles. I testified in the hearings that were held on the protest of the Wheeling to the tentative valuation fixed by the Interstate Commerce Commission on its lands in the City of Cleveland and as far south as Bedford.

The Interstate Commerce Commission fixed the tentative value of the lands of Wheeling owned and/or leased situated northerly of Eagle Avenue, as of June 30, 1918. The northerly portion of these lands down to what has been described as the easterly line of the leased premises, extending southwesterly to Canal Road, was valued by the Bureau at $11.75 per square foot, and the lands between there and Eagle Avenue were valued at $1 per square foot. Using the areas which have been used here, the I. C. C. valuation for the northwesterly portion at $11.75 per square foot would be $328,071.75; for the southerly portion, $52,547, or a total of $380,618.75, without deduction for the fee interest in the Walworth property. The I. C. C. valued the land occupied and used by Wheeling north of Eagle Avenue without reference to the fact that a part of the lands were occupied under lease instead of under ownership. My figures included in that area a part which the I. C. C. classified as non-carrier lands but which appear in this particular hearing and did not appear in the original valuation hearing.

My appraisal of Wheeling's lands north of Eagle Avenue was $18.00 per square foot, which would total $502,478, and the southerly portion at $2.50 per square foot, or $131,-

367.50, making a total of $633,845.50, this being without deduction for the fee interest in the leasehold property. I treated the leased lands just as if Wheeling had owned the fee therein.

The Cleveland Real Estate Board made a valuation of these same lands as of June 30, 1918, and their appraisal and mine were the same, all of which is a matter of evidence in the valuation proceedings, Valuation Docket 396. That matter was submitted almost three years ago but there has been no final report.

I made an appraisal of the lands owned and leased by Wheeling northerly of Eagle Avenue in Cleveland, Ohio, as of the year 1928, being the lands described in detail in the so-called option contract between Wheeling and Terminals which is an exhibit in these proceedings marked No. 11 and as shown in yellow upon Map No. 1 attached to Exhibit No. 48. The parcel outlined in brown on Map No. 1, Exhibit No. 48, with an area of 5677 square feet correctly represents the description of the so-called leased lands in Exhibit No. 11. My appraisal in 1928 of these lands of Wheeling owned and leased situated northerly of Eagle Avenue was $877,473 arrived at as follows: I divided the land into three sections, the northerly or northwesterly section extending down to the prolongation of the southeasterly line of the leased land, and this section had a frontage on Ontario Street of 361.09 feet, which I valued at $2300 per front foot. I had an intermediate section which was all of the land coming within 100 feet of Ontario Street, of which there was 19,275 square feet, which I valued at $6 per square foot. The balance of the land extending to Eagle Avenue, having an area of 33,272 square feet, I valued at $3.00 per square foot. This makes a total of $1,045,973, from which I deducted for the fee interest, subject to the lease of the Walworth land, the sum of $168,500, leaving a net value to Wheeling of $877,473.

My appraisal was made after having studied the lands and inspected them rather constantly for some nine years on various occasions as well as in connection with such appraisal. I do not recall whether the request to make the appraisal came from Mr. Duncan, Mr. Durham or Mr. Martin, but in any event I consulted from time to time with Mr. Duncan and Mr. Durham and made the appraisal as a result of a request from an officer of Wheeling. The appraisal was made as of July 1928, at which time I was requested to appraise the lands included within the limits of the so-called adjusted area shown colored in yellow on

Map 4 attached to Exhibit 48. I submitted a written appraisal of this area by letter addressed to Mr. William M. Duncan, Chairman of the Board, on July 3, 1928. The letter referred to was marked "Exhibit No. 148, Witness Cragin," identified, offered and received in evidence.

Exhibit No. 148 sets forth in detail the unit values and the total appraisal. I appraised the whole property at $1,579,053.30, or in round figures, $1,575,000, as market value is usually expressed in round figures rather than in dollars and cents.

CROSS EXAMINATION by Mr. Taplin.

I have been a representative of Wheeling in appraisals of their lands dating back to 1921. My appraisal for the I. C. C. valuation case was made in June, 1925, as of 1918. I adjusted values as between 1918 and 1925 by making an exhaustive search of all sales and leases in that vicinity. We had some rather tangible evidence of the trend of values in the Walworth leases which are reappraisal leases. Then the Real Estate Board made an appraisal and it always refers to its records which are very complete. Of course, in its final conclusion the appraisal represents the judgment of the appraisers.

Most of the sales or leases made in the neighborhood of Wheeling's property around the year 1918 were in the interests of the Van Sweringens and affiliated companies. There were deals dating back to about 1911 and almost continuously up to about 1925. By that time, as I recall it, the Van Sweringens and their affiliated companies had acquired practically all, if not all, of the Ontario Street frontage which they needed as far south as Huron Road. In fixing the value of Wheeling's property as of June 30, 1918, I took into consideration sales or leases subsequent to that time, in fact, all data we could find and which we weighed as our judgment best permitted us to do with respect to the date of valuation. While there had been no announcement of the terminal project up to June 30, 1918, there had been very definite rumors of a proposed terminal development which at that time was limited to the area bounded on the north by Prospect. My recollection is that the rumors were that there was to be an interurban terminal south of Prospect Street, promoted by the Van Sweringens, and that the approaches to the same would be from the southeast. In other words, my understanding is that the union station project started as an interurban station and not as a steam railroad union station.

Valuations submitted by me and the Cleveland Real Estate Board as of June 30, 1918, did not take into consideration the effect on Wheeling's property of the terminal development as it is now known to be. When I was requested to appraise the property in July 1928, I did not secure any data from Mr. McIntosh in reference to sales made in the neighborhood, but I think Mr. Durham at my request secured from Terminals the price paid or agreed upon for the four Walworth properties. I had considerable data of my own. I also secured from Wheeling and Terminals considerable information as to elevations and engineering data, but no information as to real estate values. They furnished me information as to contract boundaries, current information as to street elevations and engineering data of that kind, also what changes would be made in various streets. In those appraisals I did not take into consideration how much clearance Terminals would require for its tracks, nor did I separate in any way the value of an easement for railroad purposes and the value of the remaining property generally known as air rights.

I have given some consideration to the development of air rights over Wheeling's station, and while it has been my business to observe air right developments in Cleveland, I do not consider myself an expert in respect to them. I have made some investigation, but not an exhaustive study, of air rights such as have been developed in New York by the New York Central and in Philadelphia and Chicago.

I consider the most important elements entering into the value of a piece of downtown real estate as location, dimensions and topography. Good location would involve the flow and character of the traffic and many other elements. The number of people who will pass through the terminal station will affect the value of the property in the terminal area and probably affect the value of Wheeling's property. If the exchange were made in adjusted areas so as to give Wheeling the property set forth in Map 4 of Executive Committee's Exhibit No. 48, so as to bring its property with the 97 feet frontage on Huron Road extended opposite the Medical Arts Building, and if a subway were to connect Wheeling's property with the Medical Arts Building, and with the Union Station concourse, Wheeling's property would possibly and probably have an increased value by virtue of the terminal development. As to whether the number of people using the terminal station every day would have a considerable effect

on the value of Wheeling's property, that would depend on a number of conflicting elements. In the first place, the 97 feet of Huron Road frontage is not opposite the Medical Arts Building as there is some considerable area intervening between that portion of Huron Road and the Medical Arts Building, and I do not know how it will be developed. It might be developed so as to discourage rather than attract the flow of traffic. If the city traction lines were to run into the terminal station, thereby bringing large additional numbers therein, it might possibly but not necessarily add to the value of Wheeling's property.

If the city traction lines run into the station as has been proposed, it is estimated that the number of daily passengers will be about 300,000 from the traction lines and railroads. The railroad gross in Cleveland is less than 30,000 which would leave some 270,000 of traction passengers. There is at this time a proposal to co-ordinate the city traction service with the rapid transit service and put all of it through the new station.

RE-DIRECT EXAMINATION by Mr. Martin.

Assuming that the street car lines are routed through the union station and that some 300,000 people daily are brought in there by that means, I know of no situation, either existing or proposed, which would cause people to walk back to the Wheeling site or past it either on the sidewalk or by such a tunnel as has been described, unless it might be that in routing the street cars into the terminal area there was no stop less than half a mile out from the terminal. Not only is there nothing in the development of Ontario Street itself, either opposite or south of Wheeling's property shown on Map 4, which would draw pedestrians from the union terminal down that far on Ontario Street, but it is contemplated that the only magnet which now exists to attract pedestrians from the union terminal to the south of the station will be removed, namely, the Central Market. No one element controls the flow of pedestrian traffic, but so far as anything which now exists or is proposed is concerned, I know of nothing which would attract pedestrians to or past Wheeling's lands.

I was asked to advise Wheeling upon the question of the utility of its property for air right development above the Ontario Street level, and after considerable study gave as my judgment that it was inadvisable for Wheeling to consider the retention of so-called air rights above the planes which would be required by Terminals. I reached

this conclusion after securing architectural advice as to the possibility of developing the area and making a careful study of the possibilities of its development from the standpoint of income and expense of various types of buildings, and my conclusion was, in view of the hazards of the real estate market and particularly the engineering hazards attached to this particular site, it would be inadvisable to carry that study forward.

RE-CROSS EXAMINATION by Mr. Taplin.

In making my two appraisals, one in the sum of $877,473 for the restricted area, and the other $1,579,053.30 for the adjusted area of Wheeling, I tried to take into consideration all known conditions in July 1928, including the development of the terminal area as it was known at the time and as it would affect market values at the time. I took the terminal development into consideration, in fixing the value of Wheeling's property, only to the extent that it would affect market conditions in July 1928 and not as a complete terminal development.

A. S. TAYLOR called as a witness in rebuttal on behalf of applicant, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Martin.

I reside at 2571 North Park Boulevard, Cleveland Heights, Cleveland, Ohio, am sixty years of age and President of V. C. Taylor & Son., Inc., general real estate, mortgage loans and appraisals, 19th floor Union Trust Building, Cleveland, Ohio. I am also President and at the head of Alexander S. Taylor & Company, appraisers and general insurance. V. C. Taylor & Son was established in 1872. Alexander S. Taylor & Company has been in existence for a great number of years. I entered into the real estate business in June, 1888, and my connection with the Company has been practically continuous since that time. We have conducted a general real estate business which has naturally increased from year to year. We have an organization of fifteen men at the main office and, until the first of this month, three branch offices, one on the west side, now discontinued, another in Cleveland Heights and another in the City of Willoughby about twenty-five miles east of Cleveland where we handle suburban property. I myself have operated in a real estate way under the corporation known as the Corydon Real Estate Company and

have served for a number of years as Vice President of the Realty Associates which is a corporation of real estate men nationally known, owning property in various cities. I was President of the Coventry Road & Land Company; also the Coventry Land Company which developed a large property of about $1,000,000 value for Mr. Firestone in Akron and laid out a little town, Firestone Park in Akron, for workers' homes.

I am a director of The Guardian Trust Company, one of Cleveland's four largest financial institutions, and am a member of the Trust Committee which passes on all bonds and securities for estate and trust funds. I am a Trustee of the Society for Savings of Cleveland, which is Cleveland's oldest savings institution, and have served on its Finance Committee. I am also director of The Guarantee Title & Trust Company, a title and mortgage loan institution, and for ten years have served on its committee passing upon mortgage loans and securities. I am a director in The Cleveland Realization Company, a second mortgage company; have been a member of the Cleveland Real Estate Board since its inception, and I think the oldest member of that organization. I have been a member of its Board of Trustees and was President in 1908, Chairman of the Board in 1909, and in 1910 I was elected President of the National Association of Real Estate Boards, an organization similar in type and quality to the American Bar Association, as it pertains to our profession. I am now Chairman of the Advisory Board, being the oldest President of the entire existing number of past presidents.

In 1918 I joined with some six or eight other prominent real estate men to organize the Real Estate Bureau for the United States Government. I served in Washington for some time as a dollar a year man. We organized a Real Estate Department which took care of the values of the War Department, Navy, Labor and other departments. I passed upon values for the Internal Revenue Department gratuitously many times in regard to the values of property as they applied for valuation as of the year 1913 for income tax purposes. This was all work of a public nature for which I received only a nominal compensation.

In reference to my experience in connection with the sale, purchase, leasing and appraisal of real estate in downtown Cleveland, I acquired the Court House property for the County and acquired certain property for the so-called Mall during the administration of Mayor Baker. Under

earlier city administrations I acquired property for the widening of the Cuyahoga River. I served as land advisor for the County Commissioners in acquiring the right of way for the Superior and Detroit high level bridge. I served as a member of the Commission in purchasing the right of way for Bulkley Boulevard extending from the end of Superior and Detroit high level bridge to the old existing driveway near the Perkins property. Before and after the war I acquired the property required by the city in the extension of Carnegie Avenue, costing over $400,000. A recent service was to the Catholic Bishop of Cleveland in valuing a cemetery property required by the Nickel Plate Railway. I represented the Church as against the Nickel Plate for the widening of the right of way. I sold to the Brotherhood of Locomotive Engineers and Firemen the property at the corner of Superior Avenue and West 6th Street, and lately sold that property to the Van Sweringen interests. I sold the Johnson property which lies under the extreme westerly part of the so-called Rockefeller Building at the corner of Superior Avenue and West 6th. I recently sold a property on West 6th Street between St. Clair and Lakeside, and recently appraised on behalf of a Philadelphia corporation the Brotherhood of Locomotive Engineers' Bank Building and land, and also the B. L. E. Building across the street, these buildings being located on opposite corners of Ontario Street and St. Clair Avenue and being valued at several millions. I made one of the first leases on Euclid Avenue from the Clark estate on property where the May Company is now located, and appraised the property at the corner of Prospect and Ontario Street directly across from the union terminal, upon which is located The Bailey Company building.

I have for sale and made an offer which has not been accepted of $150,000 for the property at the corner of Bolivar Road, East 4th Street and Ontario Street, 13,000 square feet with a frontage on three streets, being the same property which Mr. Fackler referred to as being offered at $250,000, and this will indicate the present market situation. I appraised the Sheriff Street Market House property within the last two years. I sold to the Van Sweringen interests 40 feet on Ontario Street, a part of the proposed union station, the lot depth being 120 feet and the price $240,000, or $6,000 a front foot. I acquired property east of the Williamson Building for The First National Bank, and leased from The J. L. Hudson Company of Detroit a building on Euclid Avenue just west of the Arcade for The

W. B. Davis Company. I leased the ground under the present Electric Building which runs from Prospect Avenue to Huron Road, occupied by The Bell Telephone Company. I acquired the present site known as Keiths Hippodrome on Euclid Avenue next east of Taylor's Arcade, a large area fronting on both Euclid and Prospect, a deal involving a million and a half dollars. I leased for Mr. Charles Pack to Mr. Statler, or a corporation organized by him, the property on which the present Statler Hotel is located, that being a 99-year lease. In 1910 I leased the ground under the present Higbee Building at the corner of 13th Street and Euclid Avenue, and I made a lease to The Bailey Realty Company for the property upon which is located the present Higbee Building, the Allerton Hotel and other buildings. I sold to Dr. Crile of Cleveland the old Presbyterian Church property on which now stands the present Hanna Building at the southeast corner of Euclid Avenue and 14th Street, and I leased the property later for Dr. Crile and his Syndicate to D. R. Hanna who erected thereon a memorial building to his father, Senator Hanna. I acquired the Hanna Theatre property on Prospect Avenue adjoining the Hanna Building. I sold the corner of Superior Avenue and East 9th Street and appraised recently for the courts in Cleveland in foreclosure proceedings the Union Mortgage Building on Euclid Avenue next west of the corner of 9th Street. This is probably the finest business location in Cleveland, 102 feet front by 200 feet deep, and appraised for $2,100,000. I believe the foregoing is typical of my real estate activities in downtown Cleveland during the past ten or twenty years.

I have been consulted by the City Attorney of Cleveland recently in connection with the acquisition of the Gund property at the corner of St. Clair opposite the Auditorium.

I have never represented the Cleveland Union Terminals Company or any of the so-called Van Sweringen companies in the purchase or sale of property except as I have been called in to appraise property they had some interest in. I do not get any business from the Terminal Company and they have their own brokers and agents. I have been on the other side of the table in every argument we have had. My real estate experience in Cleveland has made me familiar with the property in the vicinity of the Wheeling property northerly of Eagle Avenue up to the Public Square, and likewise east of those lands on the opposite side of Ontario as well as to the south. I am familiar with the neighborhood and with the lands of Wheeling northerly of Eagle Avenue.

I was requested by Mr. Duncan, Chairman of the Board and President of Wheeling, some time last year to make a study and appraisal of the lands called the "adjusted area," which is shown in yellow on Map 4 of Exhibit 48. After receiving that request I spent several days with my son and with others in our organization, going over the value of this property. I took into consideration, in determining its value, recent sales, its relative location to the downtown section, its exposures on all sides, and tried to take into consideration all elements which enter into its value. We called in the men in our organization who had experience in downtown leases and sales, went through all our records which we keep which are quite complete, and we tried to secure every bit of information possible so that we could make a fair, honest and impartial appraisal. After completing this study, I or my Company reported to Mr. Duncan the results of such appraisal as shown in the letter from V. C. Taylor & Son dated July 3, 1928.

The letter referred to was marked "Applicant's Exhibit No. 149, Witness Taylor," identified, offered and received in evidence.

Exhibit No. 149 states in a general way the basis upon which our appraisal was arrived at. The appraisal was made as of July 3, 1928, and I have not changed my opinion in reference thereto.

Cross Examination by Mr. Taplin.

I was not asked to appraise the restricted area shown on Map 2 of Executive Committee's Exhibit No. 48, but only the "adjusted area." In conjunction with three other appraisers I appraised the air right property over the terminal station, upon which land trust certificates were sold. That appraisal was made for Tillotson-Wolcott Company, a financial and bond house in Cleveland, in connection with their sale of an issue of land trust certificates, on this air right site. I appraised 71,527 square feet having a frontage of 243 feet on the Public Square, 302 feet on the extension of Prospect Avenue, with an average depth of about 260 feet, for the sum of $5,931,726.00, or $82.93 per square foot. Messrs. R. F. Berwald, W. A. Greenlund and William Siegel were my co-appraisers. Mr. Berwald is one of Cleveland's outstanding real estate men; Mr. Greenlund was Lieutenant Governor of the State and one of the oldest and most reliable real estate men; and Mr. Siegel was for many years the man who valued the mortgage loans for The Union Trust Company.

About eight years ago I sold the Sackett property, being parcel 22 on Exhibit 135, 40 feet front on Ontario by 60 feet deep, at $6,000 per front foot, or $50.00 per square foot. There was a four story building on that property called the Blue Front, under lease, presently expiring, to Brown Brothers for $12,000 a year and taxes. That was all Mr. Van Sweringen would give for it, and although at first I would not agree to that figure, I agreed to the sale because I figured they were going to tear down a lot of properties adjoining it and my property would not perhaps increase in value. I was also influenced by the desire to have the immediate cash rather than the income. The sale was made about June 2, 1922, and the Van Sweringens took the property subject to the Brown Brothers lease which expired within a year, and permitted Brown Brothers to occupy the premises until the lease expired. That was a ten year lease made in 1912, so that the valuation of the property, including the building, as of that date was about $200,000. In selling the property I assume we took into consideration the value which the terminal development as then projected would have on the property, but the matter of selling only the right to the property up to a certain level and reserving the air rights was not discussed. The matter of the property being condemned if it were not sold was discussed in our family meetings, but I have no knowledge that Mr. Van Sweringen or any one else threatened to do that. I assumed they had the right to condemn the entire property.

In considering recent sales made of property in the neighborhood of Wheeling's property in connection with my appraisal thereof, neither I nor my son were furnished with information as to the actual cost of those properties. The first time I ever saw the list of the Van Sweringens' purchases was when we went to the Court House to look up the records of sales. I employed men to do that work and they secured all the information possible of sales and leases in that immediate vicinity. The Court House records do not show the consideration and I had no knowledge of the prices paid in many of the sales until just yesterday or the day before as that was private information. We secured all the information possible from men who made the sales and asked them for all the information we could secure as to what prices they received. As to the effect which we gave to the terminal development as projected in arriving at the value of Wheeling's property in our appraisal of July, 1928, we naturally considered it as we could not do otherwise. I never would have appraised the property at

the price that I did had I not realized what the terminal development meant to the property, but I gave no consideration in the appraisal of Wheeling's property to its possible development through its use of air rights above, say, a plane 20 feet below the level of Ontario Street. I have made no particular study of air right developments such as those at the Grand Central in New York. I naturally would not take into consideration in my appraisal of Wheeling's property any possible benefit that might accrue to Wheeling through the reservation of air rights unless there was furnished me a definite set of plans of the proposed improvement, believing as I do that every property has air rights but their value depends upon the method by which the property is developed and is applied rather than on an income basis. No information whatsoever was furnished me which would permit me to consider air rights over Wheeling's property.

RE-DIRECT EXAMINATION by Mr. Martin.

I know of no instance where the value of air rights plus the value of subsurface rights exceeds the value of the entire property. If a condition were to arise which would forever prevent the completion of the terminal and make it impossible for it to be operated it would certainly have not only a depressing but a killing effect upon the value of property in the vicinity of Wheeling's lands north of Eagle Avenue, and in fact would destroy a great part of that value. In appraising the property at $1,600,000 I took into account the then extent of the terminal development upon the assumption that it would go forward to ultimate completion and operation.

In reference to the appraisal of air rights which I made in conjunction with Mr. Greenlund and others, we were presented by Mr. Hampton with a set of blue prints showing the area required under that appraisal. We were also shown a sketch of the building, the various ramps and stairways leading to and from the station, and for the opening up of Prospect Avenue, the entrance ways into the various concession spaces which could be sold, and a statement as to the probable rents that would be received from the Terminal Tower Building per square foot, all of which elements entered into our determining the value of the air rights in that particular property. That appraisal as I recall was made two years ago and was based on the completion of the building and the carrying out of the plans as shown to us by Mr. Hampton and the engineers of

Terminals. The appraisal was made for the purpose of gauging the amount of land trust certificates which were to be issued against the air rights. Those land trust certificates, I understand, are perpetual securities representing undivided fractional interests in the land.

A. A. McCaslin, called as a witness in rebuttal on behalf of the applicant, being first duly sworn, testified as follows:

Direct Examination by Mr. Martin.

I am fifty-three years of age and reside at 15617 Hazel Road, East Cleveland. I have been engaged in various branches of real estate business in Cleveland for twenty-eight years. From 1901 to 1915 I was associated with the late H. Clark Ford, a lawyer, banker and real estate investor. From 1915 to the present time I have been Real Estate Officer and Vice President of The Cleveland Trust Company, a member of the Trust Committee of The Cleveland Trust Company, and actively concerned in the Estates Department. I am primarily responsible for the care, management, sale or leasing of more than 2000 parcels of real estate, and also in the investment of large amounts in tax free fees for trust investment. The Cleveland Trust Company is the second largest trust company in Cleveland and, I think, in Ohio. I have been a member of the Cleveland Real Estate Board for more than twenty years, and am now chairman of its Valuation Committee, having served on that Committee three years about 1920, and was elected again in 1927. That Committee values an average of more than one parcel per day the year round and in excess of ten million dollars in value per annum.

I have been a Trustee for about twenty years of the Cleveland Association of Building Owners and Managers and was president of that Association for two years. I am Treasurer of the Euclid Avenue Association and Trustee of the Prospect Avenue Association. I am Vice President and Treasurer of the Williamson Company which owns and operates the Williamson Building and the Plymouth Building at Prospect and 22nd Street. I am Vice President and Treasurer of the New Amsterdam Company which owns and operates the New Amsterdam Hotel at Euclid Avenue and East 22nd Street. I am President of the Ford-McCaslin Company which is engaged in a general real estate business, and am President of the Haddam Building Company which has purchased since I became President something

over $2,000,000 worth of property as a subsidiary of The Cleveland Trust Company. I am Treasurer of the Willoughby Terminals Company which has developed about one-eighth of the business property in the village of Willoughby; am Secretary and Treasurer of the Federal Improvement Company which owns property on Euclid, Carnegie and East 65th Street as well as land on the Pennsylvania Railroad. I am President of the Highland Realty Company which owns a business block on Detroit Avenue in Lakewood. I am a director of the Hippodrome Building Company which owns the Hippodrome Building and is interested in the Hippodrome Theater. I am also a director of the Berwald-Stewart Company; the Keller Company; and the Bolivar Improvement Company, all of which are real estate companies.

I have taken active part in arbitration for revaluation under 99-year leases on the Williamson Building property, the Hippodrome Building, the Arcade, the Cleveland Trust property on East 9th Street and the property on Euclid Avenue at East 13th Street, the first three properties being improved with large office buildings and the last with a smaller building devoted to commercial uses. I have had active charge for a great many years of the management of the Williamson Building, and our company, the Ford-McCaslin Company, has managed the Society for Savings Building and the Bulkley Building and I have had charge for ten or twelve years of two office buildings in Chicago.

In connection with the investment of trust funds at The Cleveland Trust Company I have negotiated purchases in recent years of several million dollars worth of fees subject to ninety-nine year leases, and in each case I have had to analyze the actual or potential earning power of the property. In my work with The Cleveland Trust Company for the past twelve or fifteen years I have participated in the appraisal of a large number of properties for substantial loans and real estate bond issues. I have been appointed by the courts to appraise property, the latest appraisal being in connection with the Union Mortgage Company of which Mr. Berwald is receiver. I was appointed as one of the appraisers to value all of the larger property owned by that Company.

As a result of the foregoing experience I consider myself familiar with the values of downtown real estate in Cleveland such, for example, as the territory shown on Exhibit 12, and I have particular familiarity with the property in the vicinity of Wheeling's land north of Eagle Avenue. As an officer of The Cleveland Trust Company I

represented the Walworth Estate in the sales made of portions of that property; also the Y. W. C. A. owned parcel on Ontario Street. Those Walworth sales are listed on Exhibit 135 under the head of Walworth.

In the spring or early summer of 1928 I was asked by Mr. Duncan, Chairman of the Board and President of Wheeling, to make an appraisal of the hypothetical piece of property shown outlined in yellow on Map 4 of Exhibit 48, which is there called the "adjusted area." Before arriving at an appraisal I inspected the property; refreshed my recollection on the transactions involving the Walworth property, checked the rents we were receiving on the properties in that vicinity of which I had knowledge, and from this information reached the conclusion as set forth in the letter of July 10, 1928, from myself as Vice President of The Cleveland Trust Company to Mr. Duncan. The letter referred to was marked "Applicant's Exhibit 150, Witness McCaslin" and received in evidence.

Exhibit 150 sets forth the units either in running feet or square feet. My appraisal of the value of the so-called adjusted area as of July, 1928, was $1,418,598.

Cross Examination by Mr. Taplin.

Mr. Harris Creech is President of The Cleveland Trust Company of which I am Vice President and Real Estate Officer, and while I talked with him about the appraisal of Wheeling's property that was subsequent to Mr. Duncan's request to me to make such appraisal. I represented the Walworth Estate in the sale of four parcels on Ontario Street to the terminal interests, in the summer of 1927. In those sales I think I took into consideration the full extent to which the terminal development would affect values in that neighborhood. I made no other appraisal of Wheeling's property other than the property shown in yellow on Sheet 4 of Exhibit 48, and I was not asked to appraise what is referred to as the owned and leased property of Wheeling.

Stipulation that the report and order of the Commission in Docket No. 21012, I. C. C. v. Baltimore & Ohio Railroad Company, and related dockets, admitted as Exhibit No. 97, was actually released to the public for the first time at 3:30 P. M. on March 12, 1929.

Charles M. Pohlman, called as a witness in rebuttal in behalf of applicant, being first sworn, testified as follows:

DIRECT EXAMINATION by Mr. Martin.

I reside at 416 Elm Street, Westfield, New Jersey, and am employed by The New York Trust Company as Assistant Manager of the Transfer Department. I am also the signatory Assistant Secretary of The Wheeling & Lake Erie Railway Company, and as such authorized to sign and seal Wheeling's stock certificates when presented to The New York Trust Company as Transfer Agent for Wheeling at the time or after surrendered stock certificates are presented for transfer. Upon request I have looked up the records to determine when certain stock of Wheeling standing in the names of Central, B. & O., P. L. Crowley, A. H. Harris, Warren S. Hayden, Daniel Willard, George M. Shriver and Newton D. Baker was transferred upon the books of Wheeling, in the possession of the New York Trust Company's transfer agent, this being the stock which is listed under the left-hand headings of Exhibit No. 98. All this stock was presented to The New York Trust Company for transfer prior to March 12, 1929, which I verified by inquiry of The Guaranty Trust Company, ascertaining that the stock was presented by it March 11, 1929.

CROSS EXAMINATION by Mr. Taplin.

The stock went through our records March 12, 1929, and was actually transferred on that date, new certificates being drawn and signed. This being an approval item, the certificates would have to come in for transfer before that date.

C. E. BAHL, called as a witness in rebuttal in behalf of applicant, being first sworn, testified as follows:

DIRECT EXAMINATION by Mr. Martin.

I reside at 1831 Taylor Road, Cleveland, Ohio, and have been Secretary of Wheeling since August 7, 1918. As Secretary of Wheeling I have charge of the records of the company which show when and in what manner the directors of the company were elected. I prepared two statements, headed "Dates of Election of Present Directors of the Wheeling & Lake Erie Railway Company," and the statements are correct to the best of my knowledge and belief. The statements referred to, marked "Applicant's Exhibits No. 151 and No. 152, Witness Bahl," were received in evidence.

As to the differences between Exhibits 151 and 152, Exhibit 151 is dated February 11, 1929, and Exhibit 152 is dated May 13, 1929. Exhibit 152 eliminated Mr. Cutler and shows W. F. Nash who was elected to fill the vacancy caused by the resignation of Mr. Cutler on May 8, 1929. Mr. Nash had theretofore been a director of the company for some little time.

GEORGE DURHAM, a witness in rebuttal in behalf of applicant, previously sworn, was recalled and testified as follows:

DIRECT EXAMINATION by Mr. Martin.

In my former testimony I made a statement of the passenger trains that would probably be using the new station, which statement was based on information furnished me by our General Passenger Agent. Apparently he took his information from the passenger train schedules without checking against the train sheets. On hearing Mr. Schaff's statement I had the matter checked from the train sheets of the Central and Big Four and the records in the Operating Vice President's office of the Nickel Plate, and I now have a statement which is somewhat different from the general statement. My new study is based upon trains by train numbers and not by sections. It is based on schedules. The purpose of this statement is to show the opportunities for catching trains either in or out of the station; not for the purpose of operating studies, and this statement will not represent the total use of the station, and it so says. This will not include multiple sections, so that Mr. Schaff's statement in all probability will be different from this. This does not include express or solid mail trains. This statement is headed as follows: "Statement Showing Scheduled Passenger Train (excluding multiple sections) arriving at and depa[illegible]g from Cleveland Stations of the New York Central, Nickel Plate and Big Four Railroads, for the 24-hour period ending 12 o'clock Midnight, January 10, 1929 (as reported by those companies)." The statement does not represent the use of the station in any sense, but does represent the opportunities for passengers of Wheeling to make connections with out-going trains or in-coming passengers on one of those three roads to make connections with Wheeling's trains, assuming that the schedule of January 10, 1929, is to be maintained in the union terminal. The statement referred to, marked "Applicant's Exhibit No. 153, Witness Durham," was received in evidence.

CROSS EXAMINATION by Mr. Taplin.

I do not know what the schedule of trains in and out of the new terminal station will be, and Exhibit No. 153 is simply to show what is being done now. The opportunity of Wheeling's passengers to make connections with trains of other railroads when they get into the terminal station and when the service of all the roads going in will probably be co-ordinated may not be reflected at all by Exhibit No. 153.

[fols. 588–604] Report and order of I. C. C. omitted; printed side page 52 ante.

[fol. 605] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298

OPERATION OF PASSENGER TERMINAL FACILITIES AT CLEVELAND, OHIO, BY WHEELING & LAKE ERIE RY. CO.

Finance Docket No. 7299

ABANDONMENT OF PASSENGER TERMINAL FACILITIES AT CLEVELAND, OHIO, BY WHEELING & LAKE ERIE RY CO.

ORDER AMENDING CERTIFICATES OF PUBLIC CONVENIENCE—Aug. 8, 1929

Upon consideration of the petition of the Pittsburgh & West Virginia Railway Company, intervener in the above-entitled proceedings, for a postponement of the effective date of the certificates of public convenience and necessity issued therein,

It is ordered, That said certificates be, and they are hereby, so amended as to become effective August 20, 1929.

By the Commission.

George B. McGinty, Secretary. [Seal.]

[fol. 606] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7298

OPERATION OF PASSENGER TERMINAL FACILITIES AT CLEVELAND, OHIO, BY WHEELING & LAKE ERIE RY. CO.

Finance Docket No. 7299

ABANDONMENT OF PASSENGER TERMINAL FACILITIES AT CLEVELAND, OHIO, BY WHEELING & LAKE ERIE RY. CO.

ORDER DENYING REHEARING—Aug. 8, 1929

Upon further consideration of the record in the above-entitled proceedings, of the petition of the Pittsburgh &

West Virginia Railway Company for rehearing or reargument of said proceedings, and of the answer of the Wheeling & Lake Erie Railway Company to said petition:

It is ordered, That said petition of the Pittsburgh & West Virginia Railway Company be, and it is hereby, denied.

By the commission.

George B. McGinty, Secretary. [Seal.]

[fol. 607] In United States District Court

The Pittsburgh & West Virginia Railway Company, Complainant,

vs.

The Wheeling & Lake Erie Railway Company et al., Defendants

Order re Ruling of September 10, 1929—Filed Sep. 30, 1929

The complainant having moved for a preliminary injunction pursuant to the prayer of the bill of complaint as amended, the effect of which would be to suspend or set aside an order made by the Interstate Commerce Commission, and the Hon. Paul Jones, one of the Judges of this Court, to whom such application was made, having thereupon pursuant to Sec. 48 of Title 28 of the United States Code calling to his assistance thereon Hon. Arthur C. Denison and the Hon. Smith Hickenlooper, Circuit Judges, and due notice having been given to the Interstate Commerce Commission, to the Attorney General and to the other defendants, the said motion this day came on to be heard before the three named Judges at the court-room in Cleveland. Each of the defendants, including the United States and the Interstate Commerce Commission, appeared by counsel ready to proceed with the hearing.

Thereupon complainant's counsel announced their intention to rely upon the record before the Commission and upon further evidence of witnesses to be taken in open court and their desire that thereupon the case be submitted for final decision as well as upon the pending motion. Counsel for the United States and for the Interstate Commerce Commission consented to such final submission. Counsel for the

other defendants also consented upon condition that there be received on their behalf in reply the affidavits which were [fol. 608] presented to this court in the case of the Pittsburgh & West Virginia Railway Co. against the Wheeling & Lake Erie Railway Co., #2990, with the same force and effect as if the contents thereon were stated by the affiants as witnesses before the court. Counsel for complainants consented to this condition, reserving all right of objection as to relevancy and materiality.

Thereon after discussion the court announced that the hearing, either temporary or as final, would be considered as involving two classes of questions: First, those involving the validity of the order of Interstate Commerce Commission as dependent upon the record before it and thus involving questions of public interest in which the United States and Interstate Commerce Commission are interested; and second, those involving all other grounds of attack upon the proposed action of the defendant and in which neither the United States nor the Interstate Commerce Commission was interested; and that the hearing would proceed upon the first class of questions involved; that the court would then decide whether to dispose of the matter upon those questions or to continue the hearing upon the other questions, in which latter event the hearing would continue as above arranged.

Thereupon complainant's counsel offered in evidence the record of the proceedings and testimony before the Interstate Commerce Commission and the same was received for the present as hearing upon the first class of questions, and the extent of its admissibility on the second class of questions being reserved until the hearing of that branch of the case.

Thereupon the questions of the first class involved were argued by counsel and taken under consideration by the court and the remainder of the hearing continued until the further order of the court.

To the ruling of the court that it would hear the case in [fol. 609] this manner and its refusal to hear for the present the questions of the second class, the complainant duly excepted.

Paul Jones, United States District Judge.

September 30, 1929.

O. K. The Cleveland Union Terminals Co., by W. H. Boyd, Its Atty. The Cleveland Terminals Building Co., by W. H. Boyd, Its Atty. The C. C. C. & St. L. R. R. Co., by C. C. Handy, Its Atty. The Wheeling & L. E. R. R. Co., by Squire, Sanders & Dempsey, The Pittsburgh & West Virginia Railway Co., by H. H. Hoppe, Its Atty.

[fol. 610] IN UNITED STATES DISTRICT COURT

In Equity. No. 3075

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA ET AL., Defendants

Before Denison and Hickenlooper, Circuit Judges, and Jones, District Judge

OPINION ON MOTION FOR PRELIMINARY INJUNCTION AND UPON FINAL HEARING, PURSUANT TO SEC. 47, TIT. 28, U. S. C.—Filed December 11, 1929

PER CURIAM:

Upon application of The Wheeling & Lake Erie Railway Company, hereinafter referred to as Wheeling, the Interstate Commerce Commission issued its certificate of public convenience and necessity (Finance Docket Nos. 7298 and 7299) certifying, in addition to making provision for temporary terminal facilities, that the present and future public convenience and necessity required Wheeling "to acquire passenger station facilities and service in the Union Depot of the Cleveland Union Terminals Company" and further that such present and future public convenience and necessity permitted Wheeling "to abandon the portion of its line of railroad, including its Ontario Street passenger [fol. 611] station, all in the city of Cleveland, Cuyahoga County, Ohio, described in the application in Finance Docket No. 7299 and in the report" thereon. The two applications, the one to acquire terminal facilities in the Union Depot and the other to abandon Wheeling's present

Ontario Street Station, are inseparably connected, were heard and determined together before the Interstate Commerce Commission, and the certificate of the commission is made the subject of the main inquiry in this action.

The Cleveland Union Terminals Company, hereinafter referred to as Terminals, was organized in the fall of 1918 for the purpose of constructing and operating a union depot in the city of Cleveland. The New York Central Railroad Company, its subsidiary The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter referred to as the Big Four), and the New York, Chicago & St. Louis Railroad Company (hereinafter referred to as the Nickel Plate) joined in the project as proprietary companies, consistent with sections 9160 et seq. of the General Code of Ohio, and on or about February 15, 1921, filed an application with the Interstate Commerce Commission (Finance Docket No. 1237) for authority and for a certificate of public convenience and necessity evidencing the commission's approval to the purchase of the capital stock of the Terminals. This approval was given and the certificate issued under date of December 6, 1921, authorizing the New [fol. 612] York Central to acquire 71%, the Big Four 22% and the Nickel Plate 7% of such capital stock. Such plans even then contemplated the necessity of securing Wheeling's Ontario Street passenger station site as part of the terminal project, and Wheeling accordingly filed an intervening petition before the Interstate Commerce Commission protesting the granting of the application of the proprietary companies on the ground that Wheeling was unable and unwilling to surrender its station site and that its financial condition did not permit of its entering the terminal. This protest was subsequently withdrawn under a stipulation that such withdrawal should be without prejudice to the rights of Wheeling in and to its station site. The terminal project has been progressively carried forward since the dates above referred to.

The project for the construction of the Union Station was approved by the city of Cleveland and an ordinance, No. 47,814, was enacted authorizing Terminals to proceed in accordance with the original plan. This ordinance was subsequently amended with the consent of the proprietary companies by requiring the construction of what is commonly

called the Eagle Avenue ramp. This is a street or highway connection between the higher levels of the city and the river bottoms which were to be cut off from the higher levels by the construction of the terminal and the vacation of streets crossing the terminal properties. Prior to the construction of the Eagle Avenue ramp it was entirely feasible and engineeringly possible for the lines of the terminal to pass beneath Wheeling's station site and for both com- [fol. 613] panies thereafter to operate their separate terminals. After the construction of the Eagle Avenue ramp this became a practical impossibility, necessitating one of two courses of action on the part of Terminals. Either that company must secure the Wheeling station site, offering Wheeling use of the terminal upon terms which it could afford to pay, or an additional expenditure of some $10,000,000 must be made in the construction of an impractical "engineering monstrosity."

Since Terminals was making no progress in the direction of acquiring the Wheeling station site, the New York Central, the Nickel Plate and the B. & O. Railroad Companies, which latter company had since joined as a prospective user of the terminal, each purchased, prior to May 1, 1927 and without the consent of the commission, one third of a controlling interest in Wheeling and proceeded to exercise such control in the election of the board of directors of that company. It is true that twelve of the fifteen original directors were reelected but the stock control of course tended to destroy freedom of action. Thereafter negotiations were continued and an agreement was reached as between the boards of directors of Terminals and Wheeling for the sale of the Ontario Street passenger station site to the terminal company for $1,600,000, for providing a temporary terminal for Wheeling until the completion of the Union Station and thereafter for the use of the Union Station by Wheeling [fol. 614] for a fixed term at a rental of $20,000 per annum for 3,000 trains of not more than 14,000 cars. The agreements of the proprietary companies and the B. & O. Railroad Company are founded upon a car use basis.

The purchase of the controlling interest of Wheeling by the B. & O., New York Central and Nickel Plate was attacked by Minority stockholders of Wheeling, as made without obtaining the approval of the Interstate Commerce

Commission, and on March 11, 1929, such purchase was declared to be in violation of section 7 of the Clayton Act and an order of divestiture was made by the Commission. Interstate Commerce Commission v. B. & O. R. R. Co., 152 I. C. C. 721. This order was not however complied with prior to the entering into the contracts for the sale of Wheeling's Ontario Street station and the use of the terminal.

On December 8, 1928, after the purchase of the controlling interest as aforesaid and the election of the board of directors by the B. & O., New York Central and Nickel Plate companies, Wheeling filed its applications to acquire terminal facilities in the Union Depot and to sell its Ontario Street station site to Terminals. Pending determination of these applications by the Interstate Commerce Commission a temporary contract permitting the terminal company to proceed with the work was entered into and was subsequently made the subject of the action of The Pittsburgh & West Virginia Railway Company v. The Wheeling & Lake Erie Railway Company, et al., decided in 33 Fed. [fol. 615] (2) 390. Subsequently the Interstate Commerce Commission issued its certificate of public convenience and necessity as first above stated.

The present action is primarily one to annul and avoid such certificate of public convenience and necessity and to enjoin action thereunder and as therein authorized. The action is brought by The Pittsburgh & West Virginia Railway Company as a connecting carrier and stockholder of Wheeling against the United States of America, the Interstate Commerce Commission, The Wheeling & Lake Erie Railway Company, The Cleveland Union Terminals Company, The Cleveland Terminals Building Company, Erie Railroad Company and the Big Four. The interest of the Big Four and the Erie Railroad Company in the litigation is found in that the certificates provide for temporary terminal facilities for Wheeling over the lines of the Erie and Big Four. The interest of the other defendants is obvious. Transcript of the entire evidence, proceedings and orders before the Interstate Commerce Commission was offered and forms the record in the present cause.

As an intervenor and protestant before the Interstate Commerce Commission and as a connecting carrier and stockholder of Wheeling, The Pittsburgh & West Virginia

Railway Company is a proper party plaintiff in an action to challenge the validity of the order of the Interstate Commerce Commission. Chicago Junction Case, 264 U. S. 258, 267-8.

Before considering the several specific grounds of attack it should be observed that the courts will not interfere in [fol. 616] the exercise of purely discretionary powers by the commission nor can the court consider the weight of the evidence or the wisdom of the order, provided there was evidence before the commission to sustain it. Skinner & Eddy Corp. v. U. S., 249 U. S. 557; New England Divisions Case, 261 U. S. 184; Chicago, R. I. & P. Ry. v. U. S., 274 U. S. 29. The scope of the jurisdiction of the district court under 28 U. S. C. Par. 41 (28) to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission, has been many times defined by the Supreme Court. Thus in Procter & Gamble Co. v. U. S., 225 U. S. 282, 293, referring to the provisions conferring jurisdiction on the court to entertain complaints as to affirmative orders of the commission, the Court said: "They give the court the right to take cognizance when properly made of complaints concerning the legality of orders rendered by the commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal." In Skinner & Eddy Corp. v. U. S., 249 U. S. 557, 562, the findings of the commission are said to be conclusive "unless there was lack of substantial evidence, some irregularity in the proceedings or some error in the application of rules of law." This language is repeated almost verbatim in the case of Western Chemical Co. v. U. S., 271 U. S. 268, 271. If the order attacked is made without supporting evidence or where any essential finding is unsupported by evidence the order will of course [fol. 617] be held void. Chicago Junction Case, 264 U. S. 258, 265. A question of law alone is open to consideration but even thus limited it would seem that such question of law may be whether the commission proceeded upon an obviously erroneous construction of the law (cf. Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, as explained in Chicago, R. I. & P. Ry. Co. v. U. S., 274 U. S. 29 at 33); whether the facts found were insufficient in law to sustain the orders which were made (cf. Louisville & N.

R. R. Co. v. U. S., 238 U. S. 1, 10); or whether essential findings were not made or as made were not supported by evidence (cf. Colorado v. U. S., 271 U. S. 153, 166).

The chief contention of invalidity of the certificate of public necessity and convenience relates to the question of validity of the contract of user on the part of Wheeling. It is insisted that the Cleveland Union Terminals Company is a carrier for hire under the Interstate Commerce Act and within the control of the Interstate Commerce Commission, obligated to render service to all who apply without discrimination and expressly prohibited by the Act from discriminating in rates and charges as between connecting lines; that Wheeling cannot afford to assume equality of financial obligation with New York Central, Big Four, Nickel Plate or other companies which may subsequently avail themselves of the right to use the terminal and is financially unable to assume a proportionate share of the capital charges or to pay rentals upon a strictly wheelage [fol. 618] or car use basis; that a contract offering service at a lesser rate which Wheeling can afford to pay is invalid as preferential and is subject to avoidance as discriminatory, and that the granting of the certificate of public convenience and necessity was wholly and erroneously predicated upon an assumption of the legality of such user contract.

If the contract for use of the terminal is to be held wholly illegal and void as preferential it is manifest that Wheeling would never have applied for a certificate to dispose of its station site and to contract for terminal facilities. To annul and avoid such user contract would in substance be to compel the sale of its station site over the objection and against the will of Wheeling. An option is afforded Wheeling, if at any time dissatisfied with the service, to withdraw from the terminal and to receive $200,000 with which to construct a station elsewhere. However, this would manifestly compel the construction of such station in the bottoms and much farther and more inaccessibly located from the center of the city than the location either of the present Wheeling station or of the Union Depot. To so deprive the company of central access to the city and of advantageous location of its terminal, at the only alternative of paying a ruinous rental for terminal facilities in the Union Depot,

could not possibly be conducive to public convenience or necessity so far as Wheeling, the territory it serves or its public is concerned. To this extent, even in the absence of express finding (which appears in the opinion), the validity [fol. 619] of the user contract must have been assumed or implied as a basis for the action of the commission. Except upon such assumption the sale of the old station site and the use of the terminal or the acquisition of a new station less advantageously located might temporarily profit the stockholders but could not fail to prejudice the public interest. In its opinion the Interstate Commerce Commission held "there appears to be no possibility of attack upon the terms of the contract" (viz., of user) and it is the soundness of this finding, as a matter of law, which constitutes the question here presented.

We do not think that it can be gainsaid that the establishment, construction and operation of a joint terminal by interstate carriers falls within the provisions of the Transportation Act and comes within the powers of regulation of the Interstate Commerce Commission. Railroad Commission v. Southern Pacific Company, 264 U. S. 331, 342. Cf. Southern Pac. Term. Co. v. Interstate Commerce Comm., 219 U. S. 498. There does not appear to be entire unanimity of opinion in prior adjudications as to whether as public carriers within the act and under the control of the commission, such terminals must be opened to all railroads upon equal terms or whether such terminal companies are subject to the general rule of public service corporations requiring them to serve all who apply without discrimination. See St. Louis Terminal Railroad Association Cases, 224 U. S. 383; 236 U. S. 194; 266 U. S. 17; Grand Trunk Ry. [fol. 620] v. Michigan Railroad Commission, 231 U. S. 457; Pennsylvania Co. v. U. S. 236 U. S. 351; Chicago Junction Case, 264 U. S. 258 at 267; semble contra Louisville, etc., R. R. v. Stockyards, 212 U. S. 132; Louisville & N. R. R. v. U. S., 242 U. S. 60, 73-4; Manufacturers Railway Co. v. U. S., 246 U. S. 457, 482. But suffice it to say that the true doctrine probably rests upon the fact that Congress has acted in assuming control of the interchange of traffic and compulsory use of terminal facilities, that the duties of the carriers are defined by the Transportation Act, and that the validity of the contract for the use of the terminals here involved must be determined by the provisions of such Act.

The Transportation Act as originally enacted provided that its terms "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." This quoted provision has now been eliminated by amendment and by the enactment of specific provisions for compelling joint use of terminal facilities under conditions permitting the same. 49 U. S. C., § 3, par. (4). This section empowers the commission to require the use of terminal facilities of one railroad by another "on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings." We are of the opinion that in amicable arrangements between carriers for the joint use [fol. 621] of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration the financial condition of the contracting parties, the ability to pay, the use required and all other surrounding circumstances.

It is insisted, however, that apart from the section just referred to, section 3 par. (3) of Title 49 offers an insurmountable obstacle. This section provides that carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and delivering of passengers or property to and from their several lines and those connected therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines * * *." This raises the question as to whether under the circumstances of this case the user contract of Wheeling might subsequently be held discriminatory as to charges for use of the terminal.

The inhibition against discrimination requires only that equality of charge be made for contemporaneous service of the same or similar kind. Otherwise expressed, the act requires only that all shall be treated the same under the same or similar circumstances. In the present case it is not conceivable that any other carrier could possibly present the same or a similar situation to that occupied by Wheeling.

The entire project of terminals is blocked by and dependent [fol. 622] upon the matter of obtaining the Wheeling station site. The construction of the Eagle Avenue ramp effectively destroyed all practical possibility of constructing the terminal without obtaining Wheeling's property. The contracts for the purchase of this property and for granting terminal facilities to Wheeling are wholly interdependent and the cash consideration to be paid Wheeling is predicated not alone upon the strict value of the property as such but rather upon its value in consideration of the substitution of another terminal. The two contracts must be considered as one and the consideration as single. Terminals must obtain the property, and considering the impossibility of condemning it or its acquisition otherwise than with the consent of Wheeling, the ability of Wheeling to pay, and other surrounding circumstances, a contract whereby Wheeling conveys the property for a cash consideration of $1,600,000 and an agreement for substituted terminal use at a rental of $20,000 per year for Wheeling's contemplated needs, instead of a much higher rental which could only be obtained as income from the surplus of a much higher cash consideration, appeals to the court as just and reasonable to both parties. No more satisfactory arrangement from either viewpoint, public interests considered, could be made.

While the Interstate Commerce Commission specifically held that it was without jurisdiction to prescribe the price at which the applicant (Wheeling) must dispose of its properties after abandonment and while we think that this ques- [fol. 623] tion, as well as the question of the validity of the user contract, was inseparably joined with the question of public convenience and necessity, since both were parts of an indivisible whole, the evidence upon the whole case was fully presented to the commission and is now before this court and we are unable to say that the cash payment and the user contract combined, as we believe they must be considered, do not constitute just and reasonable consideration adequately compensating and protecting Wheeling. Viewed in this light the finding of public convenience and necessity by the commission appears amply supported by the evidence.

Complainant also contends that the certificate of the commission is fatally defective in that the directors of

Wheeling were wholly controlled by the same interests which controlled Terminals and that the adverse interests of such directors of Wheeling invalidated and defeated their action upon the contracts. The existence of such adverse interests, to the extent that it might influence the exercise of fiduciary powers by directors, does not make void all actions of such directors. The contracts are not void but voidable. They are only to be scrutinized with the utmost care to determine their fairness. The minority interests are to be protected. If this question be open for consideration here our previous findings must dispose of it.

Lastly, it is contended that the contracts of abandonment and user are illegal under the Ohio law in that they have not been approved by the required vote of the stockholders [fol. 624] of either Wheeling or Terminals. Matters of procedure and conditions precedent controlling the action to be taken are within the jurisdiction of the Interstate Commerce Commission, and, Congress having acted by vesting power in such commission under the circumstances here involved, requirements prescribed the State must yield to the paramount control of the federal government. Colorado v. U. S., supra.

In addition to this answer to complainant's contention it may also be said that these last two matters discussed constituted alleged private grievances as between complainant and but one of defendants (Wheeling) in which the other defendants are but indirectly and collaterally interested, if at all. In an action to set aside and annul an order of the Interstate Commerce Commission such separate and severable causes of action against other defendants cannot properly be joined, collaterally raised or considered by the court. Cf. Illinois Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493, 505; Cleveland, C. C. & St. L. Ry. Co. v. U. S. 275 U. S. 404, 413-4.

For the reasons above stated we are of the opinion that the complainant's bill must be dismissed.

In thus directing the dismissal of the bill, we are treating the submission to us as one upon final hearing. We do not overlook the provision that plaintiff was entitled to offer [fol. 625] evidence as to the so-called private grievances, unless the court should think that, as a matter of law, those alleged grievances must be excluded from consideration in

this case. With our view of the validity and effect of the Commission's certificate we think this exclusion follows, and that the case is therefore ripe for final decree. As to those issues we in effect sustain a motion to dismiss.

Nor do we overlook the possible confusion as to the power of this three judge court. As to the private grievances, jurisdiction seemingly exists by diverse citizenship, and those issues could be heard and decided by the local district judge. As he joins in this opinion and this dismissal, it seems to follow that, even if these issues do not go to the three judge court as incidental and collateral, yet the presence and concurrence of the other judges can do no harm. The decree is that of the District Court. If counsel think that it is separable for purposes of appeal, they can preserve their rights thereto.

[fol. 626] IN UNITED STATES DISTRICT COURT

In Equity. No. 3075

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA, ET AL., Defendants

Present: Arthur C. Denison and Smith Hickenlooper, Circuit Judges, and Paul Jones, District Judge.

DECREE

In this cause, plaintiff having made an application for a preliminary injunction, and the Hon. Paul Jones, District Judge, having thereupon and pursuant to Section 47, Title 28, U. S. Code, called to his assistance the two Circuit Judges now sitting, and the motion having been heard and the cause also contingently submitted for final hearing, all as is recited in the former journal entries, and the three Judges having now filed their per curiam opinion directing the dismissal of the bill,—

It is ordered, the three Judges all concurring, as appears by such opinion, that the motion for preliminary injunction be denied and that the bill be dismissed.

Approved for Entry:

A. C. Denison, Smith Hickenlooper, Circuit Judges.
Paul Jones, District Judge.

[fol. 627] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

1929.

8/7 Bill of complaint filed. 7 copies furnished.

8/7 Motion for temporary and preliminary injunction filed.

8/7 Subpœna in equity issued for first 5 defendants. Ret. day 8/27/29. 5 copies to U. S. Mar. of N. D. of Ohio, and 5 copies of bill of complaint for service.

8/7 Subpœna in equity issued for United States of America and Interstate Commerce Commission. Ret. day 8/27/29. 2 copies to U. S. Mar. of District of Columbia and 2 copies bill of complaint, for service.

8/12 Subpœna in equity ret. & filed. Served on Aug. 8/29 on Wheeling & Lake Erie R. R. Co., Cleveland Union Terminals Co., Cleveland Terminal Building Co., and on Aug. 9/29 on Erie R. R. Co. and Cleve. Cin. Chi. & St. Louis R. R. Co., a certified copy of writ and copy of bill of complaint. Fees $20.30.

8/13 Subpœna in Equity returned and filed endorsed: U. S. Marshal's Office, Washington, D. C., August 12, 1929. Served copy of the within subpœna together with a copy of bill of complaint in said case on THE INTERSTATE COMMERCE COMMISSION by personal service on the same on T. A. Gillis, Assistant Secretary of the Interstate Commerce Commission, August 9, 1929. Edgar C. Snyder, U. S. Marshal, District of Columbia, By Harold T. Swift, Deputy U. S. Marshal. Served copy of the within subpœna together with a copy of the bill of com-

plaint in said case on William D. Mitchell Attorney General of the United States, in person on August 10, 1929. Edgar C. Snyder, U. S. Marshal, District of Columbia, By W. Jesse Nokerts, Deputy U. S. Marshal.

8/21 Amended bill of complaint filed. Copies direct served by counsel for plaintiff on all defendants. Ans. day Sept. 10/29.

9/3 Separate answer of Wheeling & Lake Erie R. R. Co. filed. Copies direct to all counsel.

9/6 Præcipe of pltf for subpœnas filed.

" Four subpœnas issued for pltfs witnesses. Copies to Mar.

" Four subpœnas duces tecum for pltfs witnesses. Copies to Mar.

9/6/29 Answer of Erie R. R. Co. to Am. Bill, filed. Copy direct.

9/6/29 Answer of Cleve. Union Terminals Co. and Cleve. Terminals Bldg. Co. to amended bill, filed. Copy mailed to atty for pltf.

9/7 Answer of Cleve. Cin. Chi. & St. Louis R. R. Co. filed. Copies direct.

9/7 Answer of United States of America, filed. Copy direct.

9/10 Answer of Interstate Commerce Commission filed. Copy direct.

9/10 Plft. Ex. #1, certified copy testimony, exhibits, etc., offered before Interstate Commerce Commission, filed.

9/10 Hearing before Denison, Hickenlooper, U. S. C. J. Jones, U. S. D. J. Taken under advisement.

[fol. 628] 9/16 Brief Interstate Commerce Com. filed.

9/11/29 2 Pltfs witness subpœnas ret. & filed. Served Fees $1.68.

9/11/29 5 Pltfs subpœnas Duces Tecum ret. & Filed. Served. Fees $2.80.

9/30/29 Minutes of trial filed & ent. J.

12/11/29 Memorandum of opinion of Court filed.

" Decree filed & ent. Preliminary injunction denied, bill dismissed. Denison, Hickenlooper & Jones, Js.

Copy of decree to Squire, S & D.

12/11/29 Copy opinion to Taplin & Fillius (3 copies
" " " " S. S. & Dempsey
" " " " Boyd, Cannon, B & W (2 copies
" " " " Charles W. Stage (Returned)
" " " " Dustin, McK, M. A. & S.
" " " " George Cottrell
" " " " Cook, McGowan, F. B. & B.
" " " " Attorney General
" " " " Interstate Commerce Com.

12/12 Record of proceedings before Interstate Commerce Commission and other papers filed with the Three Judges filed.

1/2/30 Petition for appeal filed.

1/2/30 Assignment of Errors filed.

1/2/30 Order allowing appeal & fixing bond in the sum of $1000.00 filed & ent. (Jones, J.).

1/2/30 Appeal bond approved & filed. The U. S. Guarantee Co. surety.

1/2/30 Citation issued. Ret. Feb. 1/30.

1/9/30 Citation returned & Filed. Service acknowledged.

1/9/30 Notice of appeal to all Defts. except Atty General of State of Ohio filed. Service acknowledged.

" Notice of appeal to Atty. General filed. Services acknowledged.

" Precipe for Transcript of Record filed.

1/9 Copy of judgment entry to Taplin & F.

1/20/30 Motion for order to enlarge time to docket case and file record in U. S. Supreme Ct. filed.

" Order extending time for filing narrative statement of evidence & for filing record in U. S. Supreme Court, to Feb. 15/30, filed & ent. J.

2/8/30 Motion for an order enlarging time within which to docket case & file record filed.

" Order extending time to file record & narrative statement of testimony to February 22, 1930, filed & ent. (Jones, J.)

[fol. 629] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed January 2, 1930

The Pittsburgh & West Virginia Railway Company, plaintiff in the above entitled action, feeling itself aggrieved by the final order or decree of the District Court made and entered on the 11th day of December 1929, which declined to grant an injunction against the order of the Interstate Commerce Commission entered on the 9th day of July 1929 in Finance Dockets 7298 and 7299, as amended August 8, 1929, extending the effective date thereof to August 20, 1929, and which said final order or decree dismissed plaintiff's amended bill of complaint, prays an appeal from such final order or decree to the Supreme Court of the United States.

The reasons wherein The Pittsburgh & West Virginia Railway Company considers the final order or decree of this court erroneous are set forth in an assignment of errors filed herewith, and to which reference is hereby made.

The plaintiff, The Pittsburgh & West Virginia Railway Company, prays that this its appeal may be allowed, and that a transcript of the record, proceedings and papers [fol. 630] upon which the final order or decree of this court was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

And petitioner further prays that the order of this court allowing this appeal fix and determine the amount of security which it shall give to prosecute its appeal to effect and, if it fails to make good its plea, to answer all costs which may accrue.

The Pittsburgh & West Virginia Railway Company, by C. F. Taplin, H. H. Hoppe, Its Attorneys. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

[fol. 631] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 3075

ASSIGNMENT OF ERRORS—Filed January 2, 1930

Now comes The Pittsburgh & West Virginia Railway Company, plaintiff in the above entitled cause, and in connection with its petition for appeal makes and files the following assignment of errors, which it avers occurred in the proceedings had in the above entitled cause, and upon which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December 11, 1929.

The District Court erred:

1. In failing to permanently enjoin the order of the Interstate Commerce Commission entered on the 9th day of July 1929 in Finance Dockets 7289 and 7299, as amended August 8, 1929 extending the effective date thereof to August 20, 1929.

2. In dismissing plaintiff's amended bill of complaint.

3. In holding and finding that the terminal facility being constructed and intended to be operated by The Cleveland Union Terminals Company is a joint terminal facility.

4. In holding and finding with respect to Paragraph 4 of Section 3 of Title 49, U. S. C.:

[fol. 632] "We are of the opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration the financial condition of the contracting parties, the ability to pay, the use required and all other surrounding circumstances."

5. In holding and finding with respect to the question of unjust discrimination:

"In the present case it is not conceivable that any other carrier could possibly present the same or a similar situ-

ation to that occupied by Wheeling. The entire project of terminals is blocked by and dependent upon the matter of obtaining the Wheeling station site. The construction of the Eagle Avenue ramp effectively destroyed all practical possibility of constructing the terminal without obtaining Wheeling's property. The contracts for the purchase of this property and for granting terminal facilities to Wheeling are wholly interdependent and the cash consideration to be paid Wheeling is predicated not alone upon the strict value of the property as such but rather upon its value in consideration of the substitution of another terminal. The two contracts must be considered as one and the consideration as single. Terminals must obtain the property, and considering the impossibility of condemning it or its acquisition otherwise than with the consent of Wheeling, the ability of Wheeling to pay, and other surrounding circumstances, a contract whereby Wheeling conveys the property for a cash consideration of $1,600,000 and an agreement for substituted terminal use at a rental of $20,000 per year for Wheeling's contemplated needs, instead of a much higher rental which could only be obtained as income from the surplus of a much higher cash consideration, appeals to the court as just and reasonable to both parties. No more satisfactory arrangement from either viewpoint, public interest considered, could be made."

[fol. 633] 6. In holding and finding:

"While the Interstate Commerce Commission specifically held that it was without jurisdiction to prescribe the price at which the applicant (Wheeling) must dispose of its properties after abandonment and while we think that this question, as well as the question of the validity of the user contract, was inseparably joined with the question of public convenience and necessity, since both were parts of an indivisible whole, the evidence upon the whole case was fully presented to the commission and is now before this court and we are unable to say that the cash payment and the user contract combined, as we believe they must be considered, do not constitute just and reasonable consideration adequately compensating and protecting Wheeling. Viewed in this light the finding of public convenience

and necessity by the commission appears amply supported by the evidence."

7. In holding and finding with respect to the adverse interest of twelve of the directors of the defendant, The Wheeling & Lake Erie Railway Company:

"The existence of such adverse interests, to the extent that it might influence the exercise of fiduciary powers by directors, does not make void all actions of such directors. The contracts are not void but voidable. They are only to be scrutinized with the utmost care to determine their fairness. The minority interests are to be protected. If this question be open for consideration here our previous findings must dispose of it."

8. In holding and finding:

"Lastly, it is contended that the contracts of abandonment and user are illegal under the Ohio law in that they have not been approved by the required vote of the stockholders of either Wheeling or Terminals. Matters of procedure and conditions precedent controlling the action to be taken are within the jurisdiction of the Interstate Com- [fol. 634] merce Commission, and, Congress having acted by vesting power in such commission under the circumstances here involved, requirements prescribed by the State must yield to the paramount control of the federal government."

9. In holding and finding that the question of the adverse interests of the twelve directors of the defendant, The Wheeling & Lake Erie Railway Company, and the question as to whether the things which they propose to do, and which are herein complained of, require stockholders' consent under the laws of Ohio, constitute

"alleged private grievances as between complainant and but one of defendants (Wheeling) in which the other defendants are but indirectly and collaterally interested, if at all. In an action to set aside and annul an order of the Interstate Commerce Commission such separate and severable causes of action against other defendants cannot properly be joined, collaterally raised or considered by the court."

10. In holding and finding:

"We do not overlook the provision that plaintiff was entitled to offer evidence as to the so-called private grievances, unless the court should think that, as a matter of law, those alleged grievances must be excluded from consideration in this case. With our view of the validity and effect of the Commission's certificate we think this exclusion follows, and that the case is therefore ripe for final decree. As to those issues we in effect sustain a motion to dismiss."

11. In holding and finding:

"Nor do we overlook the possible confusion as to the power of this three judge court. As to the private grievances, jurisdiction seemingly exists by diverse citizenship, and those issues could be heard and decided by the local [fol. 635] district judge. As he joins in this opinion and this dismissal, it seems to follow that, even if these issues do not go to the three judge court as incidental and collateral, yet the presence and concurrence of the other judges can do no harm. The decree is that of the District Court. If counsel think that it is separable for purposes of appeal, they can preserve their rights thereto."

12. In failing to hold and find that defendant, The Cleveland Union Terminals Company, is a common carrier for hire subject to the Act of Congress approved February 4, 1887, known as the Interstate Commerce Act, and acts amendatory thereof and supplemental thereto, including the Transportation Act of 1920, approved February 8, 1920, and acts amendatory thereof and supplemental thereto, and subject further to the Public Utility laws of the State of Ohio insofar as the latter do not conflict with the former.

13. In failing to hold and find that the rental of $20,000 per annum specified in the contract, pursuant to which the defendant, The Wheeling & Lake Erie Railway Company, proposes to use the terminal facilities of the defendant, The Cleveland Union Terminals Company, is unjustly discriminatory and preferential.

14. In failing to hold and find that the contract pursuant to which the defendant, The Wheeling & Lake Erie

Railway Company, proposes to use the terminal facilities of the defendant, The Cleveland Union Terminals Company, provides for a rebate or drawback, contrary to Section 2, Title 49, U. S. C. and Section 614-14 of the General Code of Ohio.

[fol. 636] 15. In failing to hold and find that the contract pursuant to which the defendant, The Wheeling & Lake Erie Railway Company, proposes to use the terminal facilities of the defendant, The Cleveland Union Terminals Company, is unlawful and illegal because the rental therein specified is unjustly discriminatory and preferential, and because it provides for a rebate or draw-back.

16. In failing to hold and find that, inasmuch as the contract for use by The Wheeling & Lake Erie Railway Company of the terminal facilities of The Cleveland Union Terminals Company, and the option to sell the property of The Wheeling & Lake Erie Railway Company to The Cleveland Terminals Building Company, were authorized by directors who held their office by virtue of the votes of stock held by The New York Central Railroad Company, The Baltimore & Ohio Railroad Company and The New York, Chicago & St. Louis Railroad Company, which stock had been acquired without the consent of the Interstate Commerce Commission and contrary to Section 18 of Title 15 of the United States Code, (Section 7 of the Clayton Act), and Section 8683 of the general Code of Ohio, for the purpose of stifling competition and for the purpose of forcing The Wheeling & Lake Erie Railway Company to use the terminal facilities of The Cleveland Union Terminals Company and of enabling The Cleveland Terminals Building Company to acquire the Ontario Street Passenger Station site of The Wheeling & Lake Erie Railway Company, the same was unlawful and illegal and the Commission did have jurisdiction to inquire into the same and, because thereof, to refuse to issue its certificate of public convenience and necessity therefor.

[fol. 637] 17. In failing to hold and find that the contract for use by The Wheeling & Lake Erie Railway Company of the terminal facilities of The Cleveland Union Terminals Company, and the option of The Wheeling & Lake Erie

Railway Company to sell its property to The Cleveland Terminals Building Company, provide for a change of the termini of The Wheeling & Lake Erie Railway Company, to which change the written consent of three-fourths in interest of the stockholders of The Wheeling & Lake Erie Railway Company is required, as provided by Section 8747 of the General Code of Ohio.

18. In failing to hold and find that the contract for use by The Wheeling and Lake Erie Railway Company of the terminal facilities of The Cleveland Union Terminals Company, and the option of The Wheeling & Lake Erie Railway Company to sell its property to The Cleveland Terminals Building Company, are an aid on the part of The Wheeling & Lake Erie Railway Company to The Cleveland Union Terminals Company, and a sale of a part of The Wheeling & Lake Erie Railway Company to The Cleveland Union Terminals Company, and a lease of a part of the Cleveland Union Terminals Company to The Wheeling & Lake Erie Railway Company, to all of which the assent of at least two-thirds in interest of the stockholders of The Wheeling & Lake Erie Railway Company and The Cleveland Union Terminals Company is required by Section 8809 of the General Code of Ohio.

19. In failing to hold and find that the contract for use by The Wheeling & Lake Erie Railway Company of the terminal facilities of The Cleveland Union Terminals Company, and the option of The Wheeling & Lake Erie Rail- [fol. 638] way Company to sell its property to The Cleveland Terminals Building Company, are an entension of the line of railroad of The Wheeling & Lake Erie Railway Company beyond its previous designated termini, to which a majority in interest of the shareholders of The Wheeling & Lake Erie Railway Company must consent, as required by Section 8772 of the General Code of Ohio.

20. In failing to hold and find that the consideration of $1,600,000 specified in the option, which The Wheeling & Lake Erie Railway Company has to sell its Ontario Street Passenger Station site to The Cleveland Terminals Building Company, is an inadequate consideration.

21. In failing to hold and find that The Wheeling & Lake Erie Railway Company and it minority stockholders have not had the benefit and judgment of a disinterested directorate, in that the twelve directors of The Wheeling & Lake Erie Railway Company, who have authorized the matters and things herein complained of to be done, were elected to office by the shares of stock illegally acquired, held and voted by The New York Central Railroad Company and The New York, Chicago & St. Louis Railroad Company, which two companies control The Cleveland Union Terminals Company and were under obligation to The Cleveland Union Terminals Company to secure for it the property of The Wheeling & Lake Erie Railway Company.

22. In failing to hold and find that the Interstate Commerce Commission did have jurisdiction to inquire into and apply the statutes of the State of Ohio and the general principles of law applicable to the question of the validity and legality of those things for which The Wheeling & Lake [fol. 639] Erie Railway Company sought the Commission's certificate of public convenience and necessity.

Wherefore plaintiff, The Pittsburgh & West Virginia Railway Company, prays that the final order or decree of the District Court entered December 11, 1929, refusing to grant plaintiff an injunction and dismissing plaintiff's amended bill of complaint, be reversed and that plaintiff be granted a permanent injunction against the order of the Interstate Commerce Commission entered in Finance Dockets 7298 and 7299, and for such other and further orders as may be appropriate in the premises.

The Pittsburgh & West Virginia Railway Company, by C. F. Taplin, H. H. Hoppe, Its Attorneys. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

[fol. 640] In United States District Court

[Title omitted]

Order Allowing Appeal and Fixing Bond—Filed January 2, 1930

In the above entitled cause, The Pittsburgh & West Virginia Railway Company, plaintiff, having made and filed

its petition praying for an appeal to the Supreme Court of the United States from the final order or decree of the District Court made and entered December 11, 1929, and from each and every part thereof, and having also made and filed an assignment of errors and prayer for reversal, and having in all respects conformed to the statutes and rules of the court in such cases made and provided, it is

Ordered and decreed that the appeal be and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the Northern District of Ohio, as provided by law, and is made returnable within thirty days from the date hereof; and it is further ordered that the Clerk of this court prepare and certify a transcript of the record, proceedings, judgment and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty days from the date hereof.

[fol. 641] It is further ordered that The Pittsburgh & West Virginia Railway Company give bond as security for costs on appeal in the sum of $1,000.00.

Paul Jones, Judge.

Dated January 2nd, 1930.

[fol. 642] Bond on appeal for $1,000, approved and filed January 2, 1930, omitted in printing.

[fol. 643] Citation, in usual form, showing service on Elmer B. Collins et al., filed January 9, 1930, omitted in printing.

[fol. 644] IN UNITED STATES DISTRICT COURT

[Title omitted.]

NOTICE OF APPEAL—Filed January 9, 1930

To the United States of America, the Interstate Commerce Commission, the Wheeling & Lake Erie Railway Company, the Cleveland Union Terminals Company, the Cleveland Terminals Building Company, Erie Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company:

You and each of you will please take notice that, pursuant to the statutes and rules of the court in such cases

made and provided, The Pittsburgh & West Virginia Railway Company, plaintiff in the above entitled cause, hereby appeals to the Supreme Court of the United States from the final order or decree of the District Court made and entered on the 11th day of December, 1929, which dismissed the amended bill of complaint of the plaintiff and declined to set aside, annul, suspend and permanently enjoin that certain order of the Interstate Commerce Commission in the proceeding entitled "Operation of Passenger Terminal Facilities at Cleveland, Ohio, by The Wheeling & Lake Erie Railway Company", Finance Docket 7298, and "Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by The Wheeling & Lake Erie Railway Company." Finance Docket 7299, entered at a general session of the In- [fol. 645] terstate Commerce Commission held at its office in Washington, D. C., on the 9th day of July 1929, (amended August 8, 1929 by extending the effective date thereof to August 20, 1929).

C. F. Taplin, H. H. Hoppe, Solicitors for the Pittsburgh & West Virginia Railway Company. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

Dated January 2nd, 1930.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby asknowledged.

The United States of America, by Elmer B. Collins, (R), Special Assistant to the Attorney General.

Dated Jan. 3, 1930.

The Interstate Commerce Commission, By Daniel W. Knowlton, Nelson Thomas, Solicitors for the Interstate Commerce Commission.

Dated Jan. 3, 1930.

The Wheeling & Lake Erie Railway Company, by W. C. Boyle, W. C. Boyle, Clan Crawford, Clan Crawford, Charles F. Close, Charles F. Close, Andrew P. Martin, Andrew P. Martin, Solicitors for the Wheeling & Lake Erie Railway Company. Squire, Sanders & Dempsey, 1857 Union Trust Building, Cleveland, Ohio, of Counsel.

Dated Jan. 2nd, 1930.

[fol. 646] The Cleveland Union Terminals Company, The Cleveland Terminals Building Company, by Charles W. Stage, Charles W. Stage, W. H. Boyd, W. H. Boyd, Homer H. McKeehan, Homer H. McKeehan, L. C. Wykoff, L .C. Wykoff, Solicitors for the Cleveland Union Terminals Company and The Cleveland Terminals Building Company. Boyd, Cannon, Brooks & Wickham, Dustin, McKeehan, Merrick, Arter & Stewart, George W. Cottrell, Terminal Tower Building, Cleveland, Ohio, of Counsel.

Dated Jan. 2, 1930.

Erie Railroad Company, by E. A. Foote, E. A. Foote, T. H. Burgess, T. H. Burgess, Solicitors for Erie Railroad Company. Cook, McGowan, Foote, Bushnell & Burgess, Terminal Tower Building, Cleveland Ohio, of Counsel.

Dated Jan 2, ——.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by W. N. King, W. N. King, H. N. Quigley, H. N. Quigley, C. C. Handy, C. C. Handy, Solicitors for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Dated Jan. 2, 1930.

[fol. 647] In United States District Court

[Title omitted]

Notice of Appeal—Filed January 9, 1930

To the Honorable Gilbert Bettman, Attorney General of the State of Ohio:

Please take notice that, pursuant to the statutes and rules of the court in such cases made and provided, The Pittsburgh & West Virginia Railway Company, plaintiff in the above entitled cause, hereby appeals to the Supreme Court of the United States from the final order or decree of the District Court made and entered on the 11th day of Decem-

ber 1929, which dismissed the amended bill of complaint of the plaintiff and declined to set aside, annul, suspend and permanently enjoin that certain order of the Interstate Commerce Commission in the proceedings entitled "Operation of Passenger Terminal Facilities at Cleveland, Ohio, by The Wheeling & Lake Erie Railway Company", Finance Docket 7298, and "Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by The Wheeling & Lake Erie Railway Company", Finance Docket 7299, entered at a general session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 9th day of [fol. 648] July 1929, (amended August 8, 1929 by extending the effective date thereof to August 20, 1929).

C. F. Taplin, H. H. Hoppe, Solicitors for the Pittsburgh & West Virginia Railway Company. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

Dated January 2nd, 1930.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby acknowledged this 6th day of January, 1930.

Gilbert Bettman, Attorney General of the State of Ohio.

[fol. 649] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed January 9, 1930

To the Clerk of Court:

You are hereby requested to make a transcript of the record in the above entitled cause to be filed in the Supreme Court of the United States pursuant to the appeal heretofore allowed herein, and to include in the transcript, in the order given below, the following:

1. The amended bill of complaint filed August 21, 1929.

2. The motion of The Pittsburgh & West Virginia Railway Company for a temporary and preliminary injunction, filed August 7, 1929.

3. The order of the District Court setting the motion for a temporary and preliminary injunction for hearing on September 10, 1929, at 9:30 o'clock A. M., filed August 16, 1929.

4. The separate answer to the amended bill of complaint of The Wheeling & Lake Erie Railway Company, filed September 3, 1929.

5. The joint answer of The Cleveland Union Terminals Company and The Cleveland Terminals Building Company to the amended bill of complaint, filed September 6, 1929.

[fol. 650] 6. The separate answer of Erie Railroad Company to the amended Bill of complaint, filed September 6, 1929.

7. The separate answer of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to the amended bill of complaint, filed September 7, 1929.

8. The separate answer of The United States of America to the amended bill of complaint, filed September 7, 1929.

9. The separate answer of The Interstate Commerce Commission to the amended bill of complaint, filed September 10, 1929.

10. The certified copy of the transcript of the record of the evidence and proceedings had before the Interstate Commerce Commission offered in evidence by counsel for The Pittsburgh & West Virginia Railway Company, (or in lieu thereof any narrative statement of the record of the evidence agreed upon by the parties and/or approved by the court.)

11. The order of the District Court as to its ruling made September 10, 1929, filed September 30, 1929.

12. The opinion of the District Court filed December 11, 1929.

13. The final decree of the District Court filed December 11, 1929.

14. All docket entries in their appropriate order.

15. The petition of The Pittsburgh & West Virginia Railway Company for appeal.

16. The assignment of errors filed by The Pittsburgh & West Virginia Railway Company.

17. The order of the District Court allowing the appeal and fixing bond.

18. A copy of the appeal bond.

19. The citation and proof of service thereof.
20. Notice of appeal.
21. Notice to the Attorney General of the State of Ohio.
[fol. 651] 22. This præcipe for the record.

C. F. Taplin, H. H. Hoppe, Solicitors for the Pittsburgh & West Virginia Railway Company. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

Service and receipt of a copy of the above præcipe for transcript of the record in the matter of the appeal of The Pittsburgh & West Virginia Railway Company in the above entitled cause are hereby acknowledged.

The United States of America, by Elmer B. Collins, R., Special Assistant to the Attorney General.

Dated Jan. 3rd, 1930.

The Interstate Commerce Commission, by Daniel W. Knowlton, Nelson Thomas, Solicitors for the Interstate Commerce Commission.

Dated Jan. 3rd, 1930.

The Wheeling & Lake Erie Railway Company, by W. C. Boyle, W. C. Boyle, Clan Crawford, Clan Crawford, Charles F. Close, Charles F. Close, Andrew P. Martin, Andrew P. Martin, Solicitors for the Wheeling & Lake Erie Railway Company. Squire, Sanders & Dempsey, 1857 Union Trust Building, Cleveland, Ohio, of Counsel.

Dated Jan'y 2, 1930.

[fol. 652] The Cleveland Union Terminals Company, The Cleveland Terminals Building Company, by Charles W. Stage, Charles W. Stage, W. H. Boyd, W. H. Boyd, Homer H. McKeehan, Homer H. McKeehan, L. C. Wykoff, L. C. Wykoff, Solicitors for the Cleveland Union Terminals Company and the Cleveland Terminals Building Company. Boyd, Cannon, Brooks & Wickham, Dustin, McKeehan, Merrick, Arter & Stewart, George W. Cottrell, Terminal Tower Building, Cleveland, Ohio, of Counsel.

Dated Jan. 2, 1930.

Erie Railroad Company, by E. A. Foote, E. A. Foote, T. H. Burgess, T. H. Burgess, Solicitors for Erie Railroad Company. Cook, McGowan, Foote, Bushnell & Burgess, Terminal Tower Building, Cleveland, Ohio, of Counsel.

Dated Jan. 2nd, 1930.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by W. N. King, W. N. King, H. N. Quigley, H. N. Quigley, C. C. Handy, C. C. Handy, Solicitors for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

Dated Jan. 2, 1930.

Gilbert Bettman, Attorney General of the State of Ohio.

Dated January 6th, 1930.

[fol. 653] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ORDER ENLARGING THE TIME WITHIN WHICH TO DOCKET CASE AND FILE THE RECORD THEREOF—Filed January 20, 1930

Now comes the plaintiff, The Pittsburgh & West Virginia Railway Company, and moves the court for an order enlarging the time within which to docket the above entitled case in the Supreme Court of the United States and to file the record thereof, and for cause says that the transcript of the record of the proceedings had before the Interstate Commerce Commission is such that the testimony therein contained cannot be reduced to narrative form, nor is it possible to assemble, prepare and certify the transcript of the record of this court on appeal, within the time required by law.

The Pittsburgh & West Virginia Railway Company, by C. F. Taplin, H. H. Hoppe, Its Attorneys. Taplin & Fillius, 1520 Union Trust Building Cleveland, Ohio, of Counsel.

[fol. 654] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME WITHIN WHICH TO DOCKET CASE AND FILE THE RECORD THEREOF—Filed January 20, 1930

And now on this 20th day of January, 1930, this cause came on for hearing upon the motion of The Pittsburgh & West Virginia Railway Company for an order enlarging the time within which to docket this case upon appeal in the Supreme Court of the United States and to file the record thereof. Upon consideration whereof, it appearing that further time is required to reduce to narrative statement the testimony and exhibits contained in the transcript of the record of the evidence and proceedings had before the Interstate Commerce Commission, and to assemble, prepare and certify the transcript of the record of the District Court on the appeal, and for other good cause shown, it is

Ordered that the time in which The Pittsburgh & West Virginia Railway Company shall finish, serve and file in the office of the Clerk of the District Court its narrative statement of the evidence offered before the District Court and its designation for the record of such additional papers which have been filed, and the time in which to cause the [fol. 655] transcript of the record to be completed, and in which to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, be and it is hereby enlarged to and including Saturday, the 15th day of February, 1930.

Paul Jones, Judge.

Dated January 20th, 1930.

[fol. 656] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR AN ORDER ENLARGING TIME WITHIN WHICH TO DOCKET CASE AND FILE THE RECORD THEREOF—Filed February 8, 1930

Now comes the plaintiff, The Pittsburgh & West Virginia Railway Company, and moves the court for an order fur-

ther enlarging the time within which to docket the above entitled case in the Supreme Court of the United States and to file the record thereof, and for cause says that while diligent efforts have been made by counsel for the parties hereto to reduce to narrative form the testimony taken before the Interstate Commerce Commission and to agree thereon, it now appears impossible to complete the same and to assemble, prepare and certify the transcript of the record of this court on appeal and file the same with the Clerk of the Supreme Court on or before the 15th day of February 1930.

The Pittsburgh & West Virginia Railway Company, by C. F. Taplin and H. H. Hoppe, Its Attorneys. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

[fol. 657] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME WITHIN WHICH TO DOCKET CASE AND FILE THE RECORD THEREOF—Filed Feb. 8, 1930

And now on this 8th day of February 1930, this cause came on for hearing upon the motion of the plaintiff, The Pittsburgh & West Virginia Railway Company, for an order further enlarging the time within which to docket this case upon appeal in the Supreme Court of the United States and to file the record thereof. Upon consideration whereof, it appearing that further time is required to reduce to narrative form the testimony contained in the transcript of the record of the evidence and proceedings had before the Interstate Commerce Commission and to agree thereon, and to assemble, prepare and certify the transcript of the record of the District Court on appeal, and for other good cause shown, it is

Ordered that the time in which The Pittsburgh & West Virginia Railway Company shall finish, serve and file in the office of the Clerk of the District Court its narrative statement of the testimony offered before the District Court and [fol. 658] its designation for the record of such additional

papers which have been filed, and the time in which to cause the transcript of the record to be completed and in which to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States be and it is hereby enlarged to and including Saturday, the 22nd day of February, 1930.

(Sgd.) Jones, Judge.

Dated February 8th, 1930.

[fol. 659] In United States District Court

[Title omitted]

Stipulation re Statement of Evidence and Preparation of Record for Certification to the Supreme Court.—Filed Feb. 18, 1930

Subject to the approval of the District Court, it is hereby stipulated and agreed by and between counsel for the parties hereto as follows:

I. That paragraph 3 be stricken from the præcipe for the transcript of the record filed herein on January 9, 1930, for the reason that the order of this court, under date of August 16, 1929, setting the motion of the complainant for a temporary and preliminary injunction for hearing on September 10, 1929, was not formally journalized.

II. The attached volume of condensed and narrative form of testimony constitutes a true and correct statement of all the testimony taken before the Interstate Commerce Com-[fol. 660] mission, offered and received in evidence in the District Court and now on file with the Clerk, and shall be included in the certified transcript of the record on the appeal to the Supreme Court in lieu of the certified full copy of such testimony now on file with the Clerk.

III. The Clerk in compliance with paragraph 10 of the præcipe for a transcript of the record, filed herein January 9, 1930, shall include, in the certified transcript of the record on the appeal to the Supreme Court, only the following papers and documents of the transcript of the proceedings had before the Interstate Commerce Commission, to-wit:

1. The application of Wheeling filed in Finance Docket 7298.

2. The return to questionnaire filed by Wheeling in Finance Docket 7298.

3. The application of Wheeling filed in Finance Docket 7299.

4. The return to questionnaire filed by Wheeling in Finance Docket 7299.

5. The order of the Commission dated January 17, 1929, in Finance Dockets 7298 and 7299, permitting The Pittsburgh & West Virginia Railway Company to intervene.

6. The intervening petitions of The Pittsburgh & West Virginia Railway Company filed in Finance Docket 7298.

7. The intervening petitions of The Pittsburgh & West Virginia Railway Company filed in Finance Docket 7299.

8. The order of Division 4 of the Interstate Commerce Commission dated the 23rd day of March A. D. 1929.

[fol. 661] 9. The order of the Interstate Commerce Commission dated March 26, 1929.

10. The order of the Interstate Commerce Commission dated March 27, 1929.

11. The order of the Interstate Commerce Commission dated the 22nd day of April 1929.

12. The petition of The Cleveland Union Terminals Company to intervene in Finance Docket 7298.

13. The petition of The Cleveland Union Terminals Company to intervene in Finance Docket 7299.

14. The order of the Commission dated May 27, 1929.

15. The condensed and narrative form of testimony attached hereto.

16. The report and Certificates of Public Convenience and Necessity issued by the Commission, dated July 9, 1929.

17. The order of the Commission dated August 8, 1929.

18. The order of the Commission dated August 8, 1929.

19. The original exhibits 1 to 155, both inclusive, to be certified upon the appeal to the Supreme Court as a part of the record but not to be attached thereto.

IV. The Clerk shall include in the certified transcript of the record on the appeal to the Supreme Court, in their appropriate order, copies of all papers which were filed and entered subsequent to the date of the entry of the order al-

lowing the appeal of The Pittsburgh & West Virginia Railway Company, that is to say, a copy of the appeal bond; the original citation and proof of service thereof; the notices of appeal with proof of service thereof; the præcipe for transcript of the record with proof of service thereof; [fol. 662] the motions for an order enlarging the time within which to docket the appeal in the Supreme Court; the orders of this court enlarging the time; this stipulation and the order of the court accompanying the same.

The Pittsburgh & West Virginia Railway Company, Complainant, by C. F. Taplin, H. H. Hoppe, Solicitors for the Pittsburgh & West Virginia Railway Company. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

February 8th, 1930.

The United States of America, by Elmer B. Collins, Special Assistant to the Attorney General.

February 8, 1930.

The Interstate Commerce Commission, by Nelson Thomas, Attorney for the Interstate Commerce Commission.

February 10, 1930.

The Wheeling & Lake Erie Railway Company, by W. C. Boyle, W. C. Boyle, Clan Crawford, Clan Crawford, Charles F. Close, Charles F. Close, Andrew P. Martin, Andrew P. Martin, Solicitors for the Wheeling & Lake Erie Railway Company. Squire, Sanders and Dempsey, Squire, Sanders & Dempsey, 1857 Union Trust Building, Cleveland, Ohio, of Counsel.

February 8, 1930.

[fol. 663] The Cleveland Union Terminals Company, The Cleveland Terminals Building Company, by Charles W. Stage, Charles W. Stage, W. H. Boyd, W. H. Boyd, H. H. McKeehan, Homer H. McKeehan, L. C. Wykoff, L. C. Wykoff, Solicitors for the Cleveland Union Terminals Company and the

Cleveland Terminals Building Company. Boyd, Cannon, Brooks & Wickham, Dustin, McKeehan, Merrick, Arter & Stewart, George W. Cottrell, Terminal Tower Building, Cleveland, Ohio, of Counsel.

February 8th, 1930.

Erie Railroad Company, by E. A. Foote, E. A. Foote, T. H. Burgess, T. H. Burgess, Solicitors for Erie Railroad Company. Cook, McGowan, Foote, Bushnell & Burgess, Terminal Tower Building, Cleveland, Ohio, of Counsel.

February 8th, 1930.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by W. N. King, W. N. King, H. N. Quigley, H. N. Quigley, C. C. Handy, C. C. Handy, Solicitors for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

February 8th, 1930.

Gilbert Bettman, Attorney General of the State of Ohio.

February 14th, 1930.

[fol. 664] In United States District Court

[Title omitted]

Order Approving Stipulation re Statement of Evidence and Preparation of Record for Certification to the Supreme Court

Upon examining the stipulation herein filed with respect to the statement of the evidence and the preparation of the record for certification upon appeal to the Supreme Court, it is ordered that the same be and it hereby is approved.

Pursuant thereto, it is ordered that paragraph 3 of the præcipe for the transcript of the record filed herein on January 9, 1930, be stricken therefrom; that the volume of con-

densed and narrative form of the testimony attached to the stipulation be and the same hereby is approved, and the Clerk be and he hereby is directed to include in the certified [fol. 665] copy of the transcript of the record on the appeal to the Supreme Court, in lieu of the certified full copy of the proceedings had before the Interstate Commerce Commission, only so much thereof as is set forth in paragraph III of the stipulation, and in the same manner to include, in their appropriate order, the papers specified in paragraph IV of the stipulation.

Jones, Judge.

February 18th, 1930.

[fol. 666] In United States District Court

[Title omitted]

Clerk's Certificate

United States of America,
Northern District of Ohio,
Eastern Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the within, foregoing, attached and accompanying printed and typewritten papers, all of which have been carefully compared by me with the originals now on file in my office, constitute a true and complete transcript of the record and proceedings (exclusive of Original Exhibits Nos. 1 to 155, both inclusive, which are not attached hereto but which as a part of the record are separately certified herewith), had in the case of The Pittsburgh & West Virginia Railway Company versus The United States of America, The Interstate Commerce Commission, The Wheeling & Lake Erie Railway Company et al., In Equity, No. 3075, District Court of the United States, Northern District of Ohio, Eastern Division, according to the præcipe for the record and the stipulation of the parties [fol. 667] and the order of the court approving the stipulation and directing the inclusion of the narrative and condensed statement and papers specified in Paragraphs III

and IV of the stipulation in the transcript of the record on the appeal.

In testimony whereof I hereunto set my hand and the seal of said court at Cleveland in said District, this 20th day of February A. D. 1930, and in the one hundred and fifty-fourth year of the Independence of the United States of America.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, Eastern Division, by F. J. Denzlert, Deputy. (Seal of the District Court, Northern Dist. of Ohio.)

[fols. 668 & 669] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PRINTING RECORD—Filed Feb. 21, 1930

The Pittsburgh & West Virginia Railway Company, appellant in the above entitled cause, says that the points upon which it intends to rely in this Court in this case upon appeal are as follows:

I. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the appellee, The Cleveland Union Terminals Company, is an interstate and intrastate common carrier for hire.

A. Subject to regulation by the Interstate Commerce Commission and to the provisions of the act of Congress [fol. 670] approved February 4, 1887, known as the Interstate Commerce Act, and of acts amendatory thereto and supplementary thereof, including the act known as the Transportation Act of 1920 approved February 8, 1920, and of acts amendatory thereto and supplementary thereof. (Title 49, U. S. C. Section 1 et seq.)

B. Subject to regulation by the Public Utilities Commission of Ohio pursuant to the provisions of Section 501 et seq. of the General Code of Ohio.

C. And that as such it must file tariffs, it cannot make preferential contracts and cannot grant rebates.

II. The District Court and the Interstate Commerce Commission erred in finding and holding that appellee, The

Cleveland Union Terminals Company, was constructing a joint terminal facility, and that by reason of Title 49, U. S. C. Section 3, Paragraph 4, the carriers using the same could agree between themselves upon the terms of their joint use of such terminal without regulation by the Interstate Commerce Commission.

III. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the contract under which appellee, The Wheeling & Lake Erie Railway Company, proposes to use the terminal facilities of the appellee, The Cleveland Union Terminals Company, is illegal, in that it

A. Is not in accordance with any filed tariff or schedule.

B. Is unjustly preferential and discriminatory.

C. Provides for a rebate.

IV. The District Court erred in failing to find and hold that the report of the Interstate Commerce Commission repoints I, II and III hereof are

A. Without warrant in law and contrary to law.

[fol. 671] B. Arbitrary, in that the Interstate Commerce Commission ignored the testimony offered in respect thereto.

V. The District Court erred in finding and holding that the contract under which appellee, The Wheeling & Lake Erie Railway Company, proposes to use the terminal facilities of appellee, The Cleveland Union Terminals Company, and the option which appellee, The Wheeling & Lake Erie Railway Company, has to sell its Ontario Street Passenger Station site to appellee, The Cleveland Terminals Building Company, are wholly interdependent and that the cash consideration to be paid by The Cleveland Terminals Building Company to The Wheeling & Lake Erie Railway Company for its Ontario Street Passenger Station site is predicated not alone upon the strict value of the property as such, but rather upon its value in consideration of the substitution by The Cleveland Union Terminals Company of other terminal facilities; that the contract to use the terminal facilities of The Cleveland Union Terminals Com-

pany and the option contract to sell the Ontario Street Passenger Station site to The Cleveland Terminals Building Company must be considered as one and the consideration as single; and that when so considered, together with the financial condition of and the strategic position occupied by The Wheeling & Lake Erie Railway Company there is no unjust preference or discrimination in the contract under which The Cleveland Union Terminals Company proposes to furnish terminal facilities and service to The Wheeling & Lake Erie Railway Company.

VI. The Ditsrict Court and the Interstate Commerce Commission erred in failing to find and hold that the rental of $20,000.00 per annum specified in the contract under which appellee, The Wheeling & Lake Erie Railway Com- [fol. 672] pany, proposes to use the terminal facilities of appellee, The Cleveland Union Terminals Company, is subject to change.

VII. The District Court and the Interstate Commerce Commission erred in failing to find and hold that, inasmuch as the contract for use by appellee, The Wheeling & Lake Erie Railway Company, of the terminal facilities of the appellee, The Cleveland Union Terminals Company, and the option contract to sell the property of The Wheeling & Lake Erie Railway Company to appellee, The Cleveland Terminals Building Company, were authorized by directors who held their office by virtue of the votes of stock held by The New York Central Railroad Company, The Baltimore & Ohio Railroad Company and The New York, Chicago & St. Louis Railroad Company, which stock had been acquired without the consent of the Interstate Commerce Commission and contrary to Section 18 of Title 15 of the United States Code, (Section 7 of the Clayton Act), and Section 8683 of the General Code of Ohio, for the purpose of stifling competition and of forcing The Wheeling & Lake Erie Railway Company to use the terminal facilities of The Cleveland Union Terminals Company and of enabling The Cleveland Terminals Building Company to acquire the Ontario Street Passenger Station site of The Wheeling & Lake Erie Railway Company, the same were unlawful and illegal and the Interstate Commerce Commission did have jurisdiction to inquire into the same and, because thereof, to refuse to

issue its certificates of public convenience and necessity therefor.

VIII. The District Court and the Interstate Commerce Commission erred in failing to find and hold that that for which The Wheeling & Lake Erie Railway Company sought certificates of public convenience and necessity from the Interstate Commerce Commission, and the action which The [fol. 673] Wheeling & Lake Erie Railway Company now proposes to take pursuant to the certificates of public convenience and necessity, was and is unlawful and illegal for want of stockholders' consent, in that

A. It provides for a change in the termini of The Wheeling & Lake Erie Railway Company, to which stockholders' consent is required by Section 8747 of the General Code of Ohio.

B. It is an aid and a sale of part of a railroad to another railroad and a lease of part of a railroad to another railroad, to which stockholders' consent is required by Section 8809 of the General Code of Ohio.

C. It is an extension of the line of railroad of The Wheeling & Lake Erie Railway Company, to which stockholders' consent is required by Section 8772 of the General Code of Ohio.

IX. The District Court erred in finding and holding that the requirements of the statutes of the State of Ohio, requiring stockholders' consent to that which The Wheeling & Lake Erie Railway Company now proposes to do, must yield to the paramount control of Congress and the Federal Government over interstate commerce.

X. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the consideration of $1,600,000 specified in the option which The Wheeling & Lake Erie Railway Company has to sell its Ontario Street Passenger Station site to appellee, The Cleveland Terminals Building Company, is inadequate.

XI. The District Court and the Interstate Commerce Commission erred in failing to find and hold that The Wheeling & Lake Erie Railway Company has not had the benefit and judgment of a disinterested directorate.

XII. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the Inter-
[fol. 674] state Commerce Commission did have jurisdiction to consider and apply the statutes of the State of Ohio and the general principles of law involved in Points VIII, X and XI hereof.

XIII. The District Court erred in finding and holding that the questions raised under Points VIII, X and XI hereof constitute alleged private grievances as between the appellant and but one of the appellees, The Wheeling & Lake Erie Railway Company, in which the other appellees are but indirectly and collaterally interested, if at all, and that such separate and severable causes of action cannot properly be joined, collaterally raised or considered by the court in an action to set aside and annul an order of the Interstate Commerce Commission.

XIV. The District Court erred in refusing to admit into evidence certain testimony offered by the appellant in support of the questions raised in Points VIII, X and XI hereof and, in effect, sustaining a motion to dismiss as to such issues.

XV. The District Court and the Interstate Commerce Commission erred in holding and finding that public interest required or permitted The Wheeling & Lake Erie Railway Company to take up passenger station facilities in the union depot of The Cleveland Union Terminals Company and to abandon its Ontario Street Passenger Station site.

The Pittsburgh & West Virginia Railway Company, by C. F. Taplin, H. H. Hoppe, Its Solicitors. Taplin & Fillius, 1520 Union Trust Building, Cleveland, Ohio, of Counsel.

[fol. 675] Service of the foregoing statement of points to be relied upon and the receipt of a copy thereof are hereby acknowledged this 21st day of February, 1930.

Elmer B Collins, Special Assistant to the Attorney General, Solicitor for the United States of America. Nelson Thomas, Attorney for the Interstate Commerce Commission.

Service of the foregoing statement of points to be relied upon and the receipt of a copy thereof are hereby acknowledged this 20th day of February, 1930.

W. C. Boyle, Clan Crawford, Charles F. Close, Andrew P. Martin, Solicitors for the Wheeling & Lake Erie Railway Company. Charles W. Stage, W. H. Boyd, H. H. McKeehan, L. C. Wykoff, Solicitors for the Cleveland Union Terminals Company and The Cleveland Terminals Building Company. E. [fol. 676] A. Foote, T. H. Burgess, Solicitors for Erie Railroad Company. W. N. King, H. N. Quigley, C. C. Handy, Solicitors for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Gilbert Bettman, Attorney General of the State of Ohio.

[fols. 677 & 678] STIPULATION DESIGNATING THE PARTS OF THE RECORD WHICH SHALL BE PRINTED

The parties by their respective counsel stipulate that the entire record now on file (subject to such omissions as the Clerk shall make pursuant to Paragraph 9 of Rule 13) shall be printed for the hearing of the foregoing appeal and the consideration of points filed, except so much and such parts thereof as are designated below which shall not be printed or otherwise reproduced by the Clerk, that is to say there shall be omitted:

Title of paper	Record page
1. Exhibit 1 attached to the application of The Wheeling & Lake Erie Railway Company filed with the Interstate Commerce Commission in Finance Docket 7298, with the notation that the same is identical with Original Exhibit 31 on file with the Clerk	173
2. [fol. 679] Exhibit A attached to Exhibit 2 of the application of The Wheeling & Lake Erie Railway Company filed with the Interstate Commerce Commission in Finance Docket 7298	189

Title of paper	Record page
3. Exhibit A attached to Part 1 of Exhibit 3 attached to the application of The Wheeling & Lake Erie Railway Company filed with the Interstate Commerce Commission in Finance Docket 7298	202
4. The print attached to Part 2 of Exhibit 3 of the application of The Wheeling & Lake Erie Railway Company filed with the Interstate Commerce Commission in Finance Docket 7298	212
5. Exhibit 1 attached to the return to questionnaire filed by The Wheeling & Lake Erie Railway Company with the Interstate Commerce Commission in Finance Docket 7298	236
6. Exhibit 1 attached to the application of The Wheeling & Lake Erie Railway Company filed with the Interstate Commerce Commission in Finance Docket 7299, with the notation that the same is identical with Original Exhibit 31 on file with the Clerk	252
7. The intervening petition filed by The Pittsburgh & West Virginia Railway Company in Finance Docket 7299 and the supplemental intervening petition filed January 22, 1929 with the notation that the same are identical with the intervening petition and supplemental intervening petition of The Pittsburgh & West Virginia Railway Company filed in Finance Docket 7298	286, 290
8. The condensed and narrative form of testimony, as the requisite number of printed copies thereof are furnished to the Clerk herewith to be incorporated in the record	318
9. The report and certificates of public convenience and necessity issued by the Interstate Commerce Commission dated July 9, 1929, as the same are a part of the amended bill of complaint	52, 82
10. Original Exhibits Nos. 1 to 155.	

[fol. 680] On the hearing of the appeal any party, in brief and/or oral argument, may refer to the foregoing Exhibits or to any of them so omitted from the printing, provided that the party so referring to them or any of them shall produce in appropriate form for the use of the court and

counsel at least twelve copies of each of such of those Exhibits as he desires the Court specifically to consider.

The Pittsburgh & West Virginia Railway Company, by C. F. Taplin and H. H. Hoppe, Its Solicitors.

February 20, 1930.

The United States of America, by Elmer B. Collins, R., Special Assistant to the Attorney General, its Solicitor.

February 21, 1930.

The Interstate Commerce Commission, by Nelson Thomas, Its Attorney.

February 21, 1930.

The Wheeling & Lake Erie Railway Company, by W. C. Boyle, Clan Crawford, Charles F. Close, Andrew P. Martin, Its Solicitors.

February 20, 1930.

[fol. 681] The Cleveland Union Terminals Company, The Cleveland Terminals Building Company, by Charles W. Stage, W. H. Boyd, H. H. McKeehan, L. C. Wykoff, Their Solicitors.

February 20, 1930.

Erie Railroad Company, by E. A. Foote, T. H. Burgess, Its Solicitors.

February 20, 1930.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by W. N. King, H. N. Quigley, C. C. Handy, Its Solicitors.

February 20, 1930.

Gilbert Bettman, Attorney General of the State of Ohio.

February 20, 1930.

[fol. 682] [File endorsement omitted.]

Endorsed on cover: File No. 34,811. N. Ohio D. C., U. S. Term No. 680. The Pittsburgh & West Virginia Railway Company, appellant, vs. The United States of America, The Interstate Commerce Commission, The Wheeling & Lake Erie Railway Company, et al. Filed February 21, 1930. File No. 34,811.

FILE COPY

FEB 21 1930

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1929.

No. 680

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE WHEELING & LAKE ERIE RAILWAY COMPANY,
THE CLEVELAND UNION TERMINALS COMPANY,
THE CLEVELAND TERMINALS BUILDING COMPANY,
ERIE RAILROAD COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellees.

MOTION TO ADVANCE.

C. F. TAPLIN,
H. H. HOPPE,
Solicitors for The Pittsburgh & West Virginia Railway Company.

TAPLIN & FILLIUS,
1520 Union Trust Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

OCTOBER TERM 1929.

No. .....

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
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vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE WHEELING & LAKE ERIE RAILWAY COMPANY,
THE CLEVELAND UNION TERMINALS COMPANY,
THE CLEVELAND TERMINALS BUILDING COMPANY,
ERIE RAILROAD COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellees.

MOTION TO ADVANCE.

MAY IT PLEASE THE COURT:

Now come the parties hereto by their respective counsel and jointly move the Court to advance this cause for hearing, and respectfully show:

1. This is an action in which the appellant, The Pittsburgh & West Virginia Railway Company, is seeking to enjoin, annul, and set aside certificates of public convenience and necessity issued by the Interstate Commerce Commission in proceedings entitled "Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company," Finance Docket 7298, and "Aban-

donment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company," Finance Docket 7299. (154 I. C. C. 516, 534.)

2. The Act of Congress known as "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913 and for other causes," approved October 22, 1913, provides in part as follows:

> "The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. * * * Appeals to the Supreme Court shall have priority in hearing and determination over all other causes except criminal causes in that court." (October 22, 1913, Chapter 32, 38 Stat. 220; Title 28 U. S. C. Sections 47 and 47a.)

Respectfully submitted,

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,

By C. F. TAPLIN,
H. H. HOPPE,
Its Solicitors.

THE UNITED STATES OF AMERICA,

By ELMER B. COLLINS,
Special Assistant to the Attorney General, Its Solicitor.

THE INTERSTATE COMMERCE COMMISSION,

By NELSON THOMAS,

Its Solicitor.

THE WHEELING & LAKE ERIE RAILWAY COMPANY,

By W. C. BOYLE,
CLAN CRAWFORD,
CHARLES F. CLOSE,
ANDREW P. MARTIN,

Its Solicitors.

THE CLEVELAND UNION TERMINALS COMPANY,

THE CLEVELAND TERMINALS BUILDING COMPANY,

By CHARLES W. STAGE,
W. H. BOYD,
HOMER H. MCKEEHAN,
L. C. WYKOFF,

Their Solicitors.

ERIE RAILROAD COMPANY,

By E. A. FOOTE,
T. H. BURGESS,

Its Solicitors.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

By W. N. KING,
H. N. QUIGLEY,
C. C. HANDY,

Its Solicitors.

GILBERT BETTMAN,

Attorney General of the State of Ohio.

FILE COPY

FEB 21 1930

CHARLES ELMORE CROP
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1929

No. 680

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE WHEELING & LAKE ERIE RAILWAY COMPANY,
THE CLEVELAND UNION TERMINALS COMPANY,
THE CLEVELAND TERMINALS BUILDING COMPANY,
ERIE RAILROAD COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

STATEMENT AS TO JURISDICTION ON APPEAL.

C. F. TAPLIN,
H. H. HOPPE,
Solicitors for Appellant.

TAPLIN & FILLIUS,
1520 Union Trust Building,
Cleveland, Ohio,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM 1929

No. .....

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE WHEELING & LAKE ERIE RAILWAY COMPANY, *et al.*,
Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; Title 28, U. S. C. Section 345, provides that Section 238 of the Judicial Code is amended to read in part as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:
>
> (4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the

fiscal year 1913, and for other purposes' approved October 22nd, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The Act of October 22, 1913, Chapter 32, 38 Stat. 220; Title 28, U. S. C. Sections 47 and 47a; Judicial Code, Section 210, provides in part as follows:

"* * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case, if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on December 11, 1929. (R. 610)[1]

The application for appeal was presented and allowed on January 2, 1930. (R. 629 and 640)

C.

NATURE OF THE CASE AND RULING BELOW.

On December 8, 1928, appellee, The Wheeling & Lake Erie Railway Company, filed an application with The Interstate Commerce Commission, in Finance Docket 7298, for authority (a) to operate in passenger and allied services, for a period of 100 years, a proposed connecting track and passing siding of The Cleveland Union Terminals Company; (b) to acquire, for a period of 100 years, passenger station facilities and service in the new union depot of The Cleveland Union Terminals Company; and (c) to operate, temporarily, a portion of an industrial siding track of the applicant, tracks and station facilities of the Erie Railroad Company and tracks of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, all in the City of Cleveland, Ohio. (R. 160) On the same day and at the same time The Wheeling & Lake Erie Railway Company filed an application with the Interstate Commerce Commission, in Finance Docket 7299, for authority to abandon a portion of its line of railroad, including its Ontario Street Passenger Station in the City of Cleveland, Ohio. (R. 243) In this application it appears that The Wheeling & Lake Erie Railway Company has an

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[1]All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

option to sell its Ontario Street Passenger Station site at any time within five years to The Cleveland Terminals Building Company for the consideration of $1,600,000.00. (R. 249)

On January 17, 1929 the Interstate Commerce Commission granted appellant, The Pittsburgh & West Virginia Railway Company, a stockholder in and a connecting carrier of The Wheeling & Lake Erie Railway Company, leave to intervene in Finance Dockets 7298 and 7299 (R. 274), and appellant did intervene and filed intervening petitions (R. 275 and 286) and supplemental intervening petitions (R. 279 and 290) protesting the granting of the authority sought by The Wheeling & Lake Erie Railway Company. The two applications were consolidated for one hearing. During the course of the hearing, appellee, The Cleveland Union Terminals Company was granted leave to (R. 399) and it did intervene and filed intervening petitions (R. 301 and 309), and offered proof in support of the applications.

The matter was argued to the full Commission on June 17, 1929 (R. 317), and on July 23, 1929 (R. 36), the Commission made public its report and findings which were dated July 9, 1929 (R. 52), granting to The Wheeling & Lake Erie Railway Company the certificates (R. 82) of public convenience and necessity sought by it. (154 I. C. C. 516.) An application for a rehearing filed with the Interstate Commerce Commission by appellant was overruled on August 8, 1929. (R. 606)

On August 7, 1929, appellant filed its bill of complaint with the District Court for the Northern District of Ohio, Eastern Division and prayed that the certificates of the Interstate Commerce Commission aforesaid be annulled, set aside and forever enjoined. At the same time appellant filed with the court below a motion for a preliminary and temporary restraining order, which was set for hearing for

September 10, 1929. On August 21, 1929 appellant filed an amended bill of complaint. (R. 2)

On September 10, 1929, the matter came on for hearing before the Honorables Arthur C. Dennison and Smith Hickenlooper, Circuit Judges, and Paul Jones, District Judge, at which time appellant advised the court of its intention to rely upon the record taken before the Interstate Commerce Commission and upon further evidence of witnesses to be taken in open court, and that thereupon the case could be submitted for final decision as well as upon the motion pending for a preliminary injunction. (R. 607) After some discussion the court announced that the hearing, either temporary or as final, would be considered as involving two classes of questions, first, those involving the validity of the order of the Interstate Commerce Commission as dependent upon the record before it, and second, those involving all other grounds of attack; that the hearing would proceed upon the first class of questions involved and that the court would then decide whether to dispose of the matter upon those questions or to continue the hearing upon the other questions. (R. 608) To the ruling of the court that it would hear the case in this manner and the court's refusal to hear for the present the questions of the second class, the appellant duly excepted. (R. 608) The hearing proceeded upon the questions of the first class, as classified by the court, and upon the record of the proceedings had before the Interstate Commerce Commission. On December 11, 1929, the court dismissed appellant's amended bill of complaint, and refused to enjoin, annul or set aside the order of the Interstate Commerce Commission upon any of the grounds alleged by appellant and classified by the court as belonging to questions of the first class, and refused to hear any additional testimony upon questions, classified by the court as questions of the second class.

A petition to appeal (R. 629) and an assignment of errors (R. 631) were filed with the court below on January 2, 1930. The appeal was allowed by the Honorable Paul Jones on January 2, 1930 (R. 640) and the requisite bond was furnished. (R. 642)

D.

CASES BELIEVED TO SUSTAIN JURISDICTION.

The following cases, among others, in which this Court has exercised its jurisdiction upon direct appeals from district courts in suits brought to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission, are believed to sustain the jurisdiction of this Court:

St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461;

Assigned Car Cases, 274 U. S. 554;

Virginian Ry. Co. v. United States, 272 U. S. 658;

Western Chemical Co. v. United States, 271 U. S. 268;

Dayton Goose Creek Ry. Co. v. United States, 263 456.

Appellant respectfully submits that this Court has jurisdiction of this appeal by virtue of the foregoing statutory provisions.

Respectfully submitted,

C. F. Taplin,
H. H. Hoppe,
Solicitors for the Appellant,
The Pittsburgh & West Virginia Railway Company.

Taplin & Fillius,
1520 Union Trust Building,
Cleveland, Ohio,
Of Counsel.

February 20, 1930.

Service and receipt of a copy of the foregoing statement as to jurisdiction on appeal are hereby acknowledged and the right to file a statement against the jurisdiction on appeal is hereby waived.

ELMER B. COLLINS,
Special Assistant to the Attorney General, Solicitor for the United States of America.

February 21, 1930.

NELSON THOMAS,
Solicitor for The Interstate Commerce Commission.

February 21, 1930.

W. C. BOYLE,
CLAN CRAWFORD,
CHARLES F. CLOSE,
ANDREW P. MARTIN,
Solicitors for The Wheeling & Lake Erie Railway Company.

February 20, 1930.

CHARLES W. STAGE,
W. H. BOYD,
HOMER H. MCKEEHAN,
L. C. WYKOFF,
Solicitors for The Cleveland Union Terminals Company and The Cleveland Terminals Building Company.

February 20, 1930.

E. A. FOOTE,
T. H. BURGESS,
Solicitors for Erie Railroad Company.

February 20, 1930.

W. N. KING,
H. N. QUIGLEY,
C. C. HANDY,
Solicitors for The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

February 20, 1930.

GILBERT BETTMAN,
Attorney General for the State of Ohio.

February 20, 1930.

FILE COPY

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CHARLES ELMORE C

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 680.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

C. F. TAPLIN,
H. H. HOPPE,
Solicitors for Appellant.

TAPLIN & FILLIUS,
1520 Union Trust Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

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BRIEF ON BEHALF OF APPELLANT.

C. F. TAPLIN,
H. H. HOPPE,
Solicitors for Appellant.

TAPLIN & FILLIUS,
1520 Union Trust Building,
Cleveland, Ohio,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 680.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

May it please the Court:

OPINION OF THE COURT BELOW.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, dated December 11, 1929, is not as yet reported. It is, however, set forth in full in the record on page 486.

REPORT AND CERTIFICATES OF THE INTERSTATE COMMERCE COMMISSION.

The Report and Certificates of The Interstate Commerce Commission in proceedings entitled "Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.," Finance Docket 7298, and "Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.," Finance Docket 7299, and which are herein involved, are reported in 154 I. C. C. 516. They are likewise set forth in full in the record on page 38.

STATEMENT AS TO COURT'S JURISDICTION.

A printed statement of the grounds on which the jurisdiction of this Court upon appeal is invoked has been filed herein in compliance with paragraph 1 of Rule 12 and the appellees, in acknowledging service of a copy thereof, have waived the right to file a statement making against the jurisdiction of this Court.

STATEMENT OF THE CASE.

Throughout these proceedings counsel have sometimes referred to certain individuals and corporations in an abbreviated form as follows:

The Pittsburgh & West Virginia Railway Company as "Intervener," "Protestant," "Complainant" or "Plaintiff." For convenience, it will hereinafter be referred to as "Appellant."

The Wheeling & Lake Erie Railway Company as "Applicant" or "Wheeling." For convenience it will hereinafter be referred to as "Wheeling."

The Cleveland Union Terminals Company as "Terminals" and it will hereinafter be referred to as such.

The Cleveland Terminals Building Company as "Building" and it will hereinafter be referred to as such.

The Cleveland Traction Terminals Company as "Traction" and it will hereinafter be referred to as such.

The New York Central Railroad Company as "Central" and it will hereinafter be referred to as such.

The New York, Chicago & St. Louis Railroad Company as "Nickel Plate" and it will hereinafter be referred to as such.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company as "Big Four" and it will hereinafter be referred to as such.

The Baltimore & Ohio Railroad Company as "B. & O." and it will hereinafter be referred to as such.

Erie Railroad Company as "Erie" and it will hereinafter be referred to as such.

O. P. Van Sweringen and M. J. Van Sweringen as "Van Sweringens" and they will hereinafter be referred to as such.

For many years past Van Sweringens have been engaged in extensive real estate developments in and around the City of Cleveland, Ohio, and for the purpose of developing large tracts of land lying east of the City of Cleveland they constructed an electric railroad, commonly called the Rapid Transit, for the purpose of furnishing transportation to and from the lands aforesaid and the Public Square in the City of Cleveland, Ohio. (R. 7, 68, 86.) Van Sweringens also control Nickel Plate (R. 310) and dating back as far as the year 1911 (R. 409, 413, 414, 415, 419, 421), they began acquiring lands abutting the southwest corner of the Public Square in the City of Cleveland upon which to construct a terminal for the use of their Rapid Transit and Nickel Plate.

On August 26, 1918, Van Sweringens organized Terminals under the union depot laws of the State of Ohio, for the purpose of constructing and maintaining a railroad and a *common* or *union station house.* (Exhibit 68) The authorized capital stock of Terminals was $10,000.00, divided into 100 shares of the par value of $100.00 each, all of which was issued to O. P. Van Sweringen. (Exhibit 68 and Exhibit 100) Thereupon the Van Sweringens and Terminals initiated Ordinance No. 47,814 (Exhibit 110) which was passed by the Council of the City of Cleveland, Ohio, on October 23, 1918, approved by the Mayor November 1, 1918, and by the electors of the City on Jan-

uary 6, 1919, and which authorized the Mayor of the City of Cleveland to enter into a contract with Terminals for the construction, erection, operation and maintenance by Terminals of a railroad and *union depot,* in accordance with certain plans which had theretofore been prepared by Van Sweringens and Terminals, to be erected upon lands abutting the southwest corner of the Public Square in the City of Cleveland, for the *mutual accommodation and convenience of the various steam and electric lines entering the city.* This ordinance was accepted by Terminals and it thereby obligated itself to build a union depot in accordance with such plans. (R. 9, 69, 87.)

In 1918 Mr. A. H. Smith, President of Central and Regional Director under the Director General of Railroads (R. 275), started an investigation of the passenger station situation in Cleveland. In the spring of 1920 (R. 261), Central sent its engineer, Mr. H. D. Jouett, to Cleveland to study the plans which Van Sweringens and Terminals had prepared for the construction of a union station.

On the 15th day of February, 1921, Central and its subsidiary, Big Four, together with Nickel Plate, filed an application with the Interstate Commerce Commission in Finance Docket 1237, seeking authority to acquire the capital stock of Terminals and through their control of Terminals to erect, operate and maintain a railroad and union depot upon lands abutting the southwest corner of the Public Square in the City of Cleveland, Ohio, all in accordance with initiated Ordinance No. 47,814 (Exhibit 110) of the City of Cleveland, the plans and specifications which had theretofore been prepared by Van Sweringens and Terminals, and certain contracts, which, it had been proposed, be executed by Central, Big Four, Nickel Plate, Traction and Terminals. On the 6th day of December, 1921 (*The Cleveland Passenger Terminal Case,* 70 I. C. C. 659), the Commission issued its Certificates of Public Con-

venience and Necessity, and pursuant thereto the proposed contracts were simultaneously executed on December 8, 1921, as follows:

(a) Central acquired 71%, Big Four 22% and Nickel Plate 7% of the capital stock of Terminals from O. P. Van Sweringen, executing at the same time the so-called proxy agreement (Exhibit 100) giving to O. P. Van Sweringen, notwithstanding the acquisition of Terminals' stock by Central, Big Four and Nickel Plate, the right to elect the directors of Terminals until such time as its depot was fully completed.

(b) Central, Big Four, Nickel Plate and Terminals then executed the so-called Union Passenger Terminal Agreement (Exhibit 69) in which Central, Big Four and Nickel Plate agreed to use the depot of Terminals when completed, to cooperate with Terminals in the erection, construction, maintenance and operation of its depot, all in accordance with the initiated Ordinance No. 47,814 of the City of Cleveland and the plans and specifications which had theretofore been prepared therefor; to advance to Terminals from time to time upon its demand such sum or sums as may be necessary for the erection and construction of its depot and to guarantee the payment of such mortgage bonds of Terminals as may be from time to time issued for the purpose of erecting, constructing and maintaining its depot; in consideration for which Terminals agreed to acquire no lands and to make no changes in its plans for the erection and construction of the depot without the consent of Central, Big Four and Nickel Plate. The plans for the erection and construction of the depot designated parts of the union depot as a Traction Terminal, Concession Area and Joint Area, and, in the Union Passenger Terminal Agreement, Terminals agreed not to grant the use of any one of such parts to any person, firm or corporation except such as might be approved by Central, Big Four and Nickel Plate.

(c) Terminals, with the consent of Central, Big Four and Nickel Plate, entered into an agreement (Exhibit 101) with Traction, an Ohio corporation organized, owned and controlled by Van Sweringens whereby Traction was granted, for a period of nine hundred and ninety-nine years, the exclusive right to the use of the Traction Terminal and Concession Area and was granted the right to use in common with others the Joint Area.

On the 19th day of January, 1921, Van Sweringens organized or caused Building to be organized under the laws of the State of Ohio, all or a majority of the capital stock of which is owned or controlled by them (R. 9, 69, 87, 310), and they conveyed to Building all of the lands which they had acquired, dating back as far as 1911, and which were necessary for Terminals to have in order to erect, construct and maintain its union depot in accordance with the plans that had been prepared therefor. On January 1, 1922, Building and Terminals with the consent of Central, Big Four and Nickel Plate, entered into the so-called Land Contract (Exhibit 49), pursuant to the terms of which Building conveyed to Terminals all the lands which Building had acquired and which were necessary for Terminals to have upon which to construct what is known as the station area proper and the westerly approach of its depot, at cost plus carrying charges, Building reserving the air rights over a portion of the station area proper, and in consideration of such reservation agreeing to give to Terminals for the sum of one dollar a perpetual easement in and over the lands necessary for Terminals to have upon which to erect and construct the easterly approach to its station.

Wheeling, an Ohio corporation, organized in 1916 (Exhibit 51), is a successor to The Connotton Valley Railway Company, which latter company in the year 1883 acquired for its own terminal purposes in the City of Cleveland what

is known in these proceedings as Wheeling's "Ontario Street Passenger Station Site." This property, located on the west side of Ontario Street about one thousand feet south of the Public Square in the City of Cleveland, has been used by Wheeling as its main and only downtown passenger station and was so used by Wheeling's predecessors in interest ever since 1883. (R. 183)

The plans prepared by Van Sweringens and Terminals for the erection of their union depot contemplate the use of Wheeling's Ontario Street Passenger Station Site, and because of this fact some discussion was had in 1918 between Mr. A. H. Smith, Regional Director and President of Central, and Mr. Duncan, President of Wheeling. (R. 275) Upon the termination of the war, but prior to the return of Wheeling to private control, Mr. Duncan had several casual talks with Mr. Smith in which Mr. Smith stated that he thought Wheeling should go into the new station. (R. 276) Mr. Duncan replied that he was not sufficiently informed as to the station project but that "I had one objection to the report I had seen in that it apparently proceeded upon the assumption that Wheeling could afford to live in a palace and that its revenue put that out of the picture." (R. 276) In 1921 when Central, Big Four and Nickel Plate filed their application with the Interstate Commerce Commission in Finance Docket 1237 for authority to construct, through their control of Terminals, the union depot which is now being built, the directors of Wheeling authorized and directed the officers of the company

> "to present to the Interstate Commerce Commission this Company's position in respect to the proposed 'Public Square Union Passenger Station' project, and to protest and object to such action of the Commission as will destroy or in any way impair this Company's use of its present Commercial Street Freight Station and its Ontario Street Passenger Station and to prosecute such action in law or in equity as to fully protect this

Company's interests in respect thereto." (pp. 2 and 3, Exhibit 83)

Thereupon the officers of Wheeling procured leave to intervene in Finance Docket 1237 and they filed an intervening petition protesting the granting of authority sought by Central, Big Four and Nickel Plate. In this intervening petition it is recited that Wheeling's Ontario Street Passenger Station

"is more centrally located with reference to the retail business, the financial, hotel and theater districts, than the passenger station of any other carrier entering Cleveland, and such passenger facilities admit of development to meet the reasonable future requirements of the intervener. Such facilities are adequate and constitute an integral part of the railroad of this intervener, without which it will be impossible for it to discharge its duties as a common carrier." (p. 2, Exhibit 82)

"The passenger terminal facilities proposed to be constructed by the Terminals Company, as disclosed by an inspection of the application, the exhibits, and the answers to the questionnaire filed herein, * * * will completely destroy the present main passenger station and the facilities connected therewith known as the Ontario Street Passenger Station of this intervener, depriving the intervener of the use of its property, already devoted to a public use, in favor of the applicants' proposed use thereof; all contrary to law and in violation of the rights of this intervener under the constitution of the State of Ohio and the Constitution of the United States of America." (p. 3, Exhibit 82)

The directors who authorized the filing of this intervening petition are substantially the same as those who have authorized the action herein complained of. (Exhibits 151, 152) The intervening petition so filed was withdrawn on April 21, 1921, in consideration of a stipulation (Exhibit 70) between Terminals, Central, Big Four and Nickel Plate

on the one hand and Wheeling on the other, in which it was agreed that any order made by the Commission should be without prejudice or bar to or influence upon any rights of Wheeling under the laws of the State of Ohio in relation to its then existing Ontario Street Passenger Station Site. This stipulation was filed with the Commission in Finance Docket 1237, and was made a matter of record. (R. 293, 294) When the Commission issued its Report and Certificates on December 6, 1921, nothing was said therein that the same was without prejudice or bar to or influence upon any of the rights of Wheeling under the laws of the State of Ohio in relation to its Ontario Street Passenger Station Site in the City of Cleveland, Ohio, and Wheeling thereupon purposed to file an application with the Commission to modify its Certificate of Public Convenience and Necessity in order that the same might conform to the stipulation of April 21, 1921, (Exhibit 70) and in consideration of Wheeling's forbearing to file such an application a supplemental stipulation was entered into on the 26th day of January 1922, between Terminals, Central, Big Four and Nickel Plate on the one hand and Wheeling on the other, whereby it was stipulated and agreed that, notwithstanding the omission in the final order of the Commission and the failure of the final order to make any reference to the stipulation of the parties dated April 21, 1921, the final report and order of the Commission dated December 6, 1921, should nevertheless be without prejudice to the rights of Wheeling as set forth in the stipulation of April 21, 1921, which latter stipulation was by such supplemental stipulation ratified, confirmed and adopted by the parties as defining their respective rights and obligations in respect to the matters and things therein set forth, anything in the final report and order of the Commission to the contrary notwithstanding. (Exhibit 71)

In face of Wheeling's protest and the stipulations aforesaid, Terminals, soon after December 6, 1921, the date upon which the Certificates of Public Convenience were issued by the Commission in Finance Docket 1237, started to build its union depot and continued in the construction thereof until the spring of 1927 without knowing whether it could or would acquire the right to use Wheeling's Ontario Street Passenger Station Site. During this period of time frequent attempts were made to obtain the use of Wheeling's Ontario Street Passenger Station Site and to induce Wheeling to use the depot of Terminals when completed, but, as appears from the testimony of Mr. Duncan, President of Wheeling (R. 275 to 284), Wheeling then under the control of John D. Rockefeller, Jr., steadfastly refused to grant Terminals any right in its property or to agree to use the union depot of Terminals when completed, primarily because Wheeling could not afford to use the union depot of Terminals when completed.

Owing to the contour of the ground surrounding Wheeling's Ontario Street Passenger Station Site and the southwest corner of the Public Square, it was possible, prior to 1925, for both Terminals and Wheeling to use Wheeling's Ontario Street Passenger Station Site. Ontario Street at the location of Wheeling's Passenger Station is at level 90, city datum. The proposed easterly approach of Terminals across Wheeling's property is to be at level 52, city datum. In other words, the proposed easterly approach of Terminals at W_ ling's property is 38 feet below the surface of Ontario Street. It therefore was possible for Wheeling to grant Terminals an easement across its property at level 52 and for Wheeling to build its tracks at level 69 or 70 and maintain its own passenger station on top of Terminals' tracks. On April 27, 1925, the City of Cleveland, *at the request of Terminals* (R. 399), passed what is known in these proceedings as the Eagle Avenue Ramp

Ordinance, which ordinance required Terminals to build a ramp from the southerly line of Ontario Street west and down grade to the flats. (Exhibit 116) Wheeling objected to the passage of this ordinance for the reason that the proximity of the proposed Eagle Avenue Ramp to Wheeling's Ontario Street Passenger Station Site and the elevations at which *Terminals requested* and the ordinance required the Eagle Avenue Ramp to be built were such that it would preclude the possible joint use of Wheeling's property by both Terminals and Wheeling and Wheeling was not willing to give way. (R. 284) Nevertheless Terminals accepted the provisions of this ordinance *passed at its request* and thereby became obligated to build and it proceeded with the construction of the Eagle Avenue Ramp at the grade and elevation specified in the ordinance. (R. 283, 284) From the date of the passage of the Eagle Avenue Ramp Ordinance up until the spring of 1927 efforts were made by Terminals and the City of Cleveland to obtain the consent of Wheeling to the Eagle Avenue Ramp Ordinance (R. 281 to 285), but without avail. Wheeling's consent was necessary because Wheeling's tracks passing under the proposed Eagle Avenue Ramp had to be lowered before the ramp could be completed. The effect of the building of the Eagle Avenue Ramp as required in the ordinance of April, 1925 (Exhibit 116), is very well illustrated by the artist's sketch Exhibit 43. This exhibit shows that with the Eagle Avenue Ramp built in accordance with the ordinance Wheeling's tracks would have to rise at a 12.7% grade in order to superimpose them over Terminals' tracks, were Terminals granted the joint use of Wheeling's property. Operation, of course, can not be had over such a grade. (R. 246)

In February and March, 1927, and without the consent of the Interstate Commerce Commission, Central, Nickel Plate and B. & O., competitors of Wheeling, acting in

unison purchased from John D. Rockefeller, Jr., 115,193 shares out of a total of 118,826 shares of the authorized prior lien stock of Wheeling (p. 5, Exhibit 51) and divided the same equally between them. As no dividends had ever been paid upon this prior lien stock the holders thereof voting as a single class had the right, under Wheeling's charter (p. 7, Exhibit 51), at any meeting of the shareholders held for that purpose to elect a majority of the directors who were to be elected at such meeting. O. P. Van Sweringen likewise purchased in the open market 14,800 shares of the preferred stock and 168,000 shares of the common stock of Wheeling and the same were divided equally between Central, Nickel Plate and B. & O. (Exhibit 87) The stock so acquired was admittedly purchased in furtherance of a plan for the consolidation of railroads into a limited number of competitive systems, to which Central, Nickel Plate and B. & O. had agreed, but which plan had not been formally presented to the Commission or approved by them.

After acquiring Wheeling's stock, Central transferred to three of its directors, P. E. Crowley, W. S. Hayden and A. H. Harris, ten shares of common stock each; B. & O. transferred to three of its directors, Newton D. Baker, Geo. M. Shriver and Daniel Willard, ten shares of the common stock each, and Nickel Plate transferred to three of its directors, Walter L. Ross, Mantis J. Van Sweringen and Oris P. Van Sweringen, five shares of the common stock each (Exhibit 87), and these men, other than the Van Sweringens, in April, 1927, filed their applications with the Interstate Commerce Commission for authority to act as directors or officers of Wheeling. Their applications were denied by the Commission on May 8, 1928. (*Interlocking Directors of Wheeling & Lake Erie and Trunk Lines,* 138 I. C. C. 643.)

In the meantime and at the annual meeting of the shareholders of Wheeling held on the 25th day of May, 1927 (Exhibit 88), Central, Nickel Plate and B. & O. claimed that the procedure that had theretofore been taken by Wheeling in the classification of its directors had been irregular in that the classification was not made at an annual meeting, and they thereupon passed a resolution declaring it necessary and in the interest of the company that the stockholders proceed to classify and elect a whole new board of directors consisting of fifteen men, five of whom should be elected for one year, five for two years and five for three years. Central, Nickel Plate and B. & O. then likewise passed another resolution declaring that the holders of prior lien stock, voting as a class, should have the right to elect eight of the directors to be elected at the meeting, two of whom should be elected for one year, three for two years and three for three years. Such action was protested by appellant, the holder of 67,400 shares of the preferred and common stock of Wheeling, and by other shareholders representing in all a majority of the outstanding preferred and common stock of the company. Having elected eight out of the fifteen directors by means of their prior lien stock, Central, Nickel Plate and B. & O. by cumulating their votes, elected, again over the protest of appellant and other shareholders, four out of the remaining seven directors. This appellant and other shareholders in interest with it, representing in all a majority of the preferred and common stock, by cumulating their votes elected three directors. The twelve directors so elected by Central, Nickel Plate and B. & O. were the same men as those who had previously served as directors, most all of them having served since the incorporation of the company in 1916. (Exhibits 151, 152) Nine of the twelve directors so elected were never the owner of record of more than five shares of the

common stock of Wheeling; one director, Mr. W. M. Duncan, President and Chairman, held twenty shares of prior lien stock and five shares of common. Mr. Bertram Cutler held fifty shares of prior lien stock and twenty shares of common. Mr. George Durham, although General Manager of Wheeling, was not a director until the May 25, 1927, meeting, and he is the holder of record of but one share of preferred stock. (Exhibit 93)

The record thus shows that Van Sweringens, the promoters of Terminals, control Terminals, Building and Nickel Plate; that Terminals is under contract with the City of Cleveland by reason of its acceptance of the initiated ordinance to build a union depot according to certain plans which contemplate the use of Wheeling's property; that Building, by reason of its contract (Exhibit 49) with Terminals under which Terminals purchased some of the lands upon which to construct its depot, is under obligation to Terminals to furnish it a perpetual easement over other lands, including the lands of Wheeling, for the construction by Terminals of the easterly approach to its proposed union depot; that Central, and its subsidiary, Big Four, together with Nickel Plate, are, by virtue of the Union Passenger Terminal Agreement (Exhibit 69), under obligation to assist Terminals in the erection of its union depot in accordance with the plans that contemplate the use of Wheeling's property; that without knowing whether the right to use Wheeling's property would ever be obtained and in face of Wheeling's protest made in 1921 (Exhibit 82) and the two stipulations that followed (Exhibits 70 and 71), Terminals proceeded with the construction of its depot, spending millions of dollars obtained from Central, Big Four and Nickel Plate or from the sale of bonds guaranteed by them (71 I. C. C. 842; 79 I. C. C. 664 and 761; 99 I. C. C. 176; 138 I. C. C. 55); that in 1925 Terminals, over Wheeling's objection, *requested* the passage of the Eagle Avenue Ramp ordinance

and thereby obligated itself to build and proceeded to erect the Eagle Avenue Ramp at an elevation that made impossible that which had theretofore been possible, to-wit, the joint use by itself and Wheeling of Wheeling's property; that negotiations between 1918 and 1927, for the use of Wheeling's property, had produced no results; that in February and March of 1927 Central and Nickel Plate acquired substantially two-thirds of the prior lien stock of Wheeling which gave them the right to elect a majority of Wheeling's directors; that at the May 1927 annual meeting of Wheeling's shareholders they exercised that right and elected to office twelve out of fifteen directors, a majority of whom had been directors ever since 1916.

Following the annual 1927 shareholders' meeting the officials of Wheeling, who had theretofore refused while stock control was vested in John D. Rockefeller, Jr., to consent to the Eagle Avenue Ramp ordinance, consented thereto (Exhibits 76 and 77), and thereupon Mr. Duncan, President of Wheeling, who at all times prior to 1927 had maintained that Wheeling could not use Terminals' proposed depot, because "it could not afford to live in a palace," said to Mr. Van Sweringen: (R. 285)

> "Now it is perfectly apparent that the Wheeling has not the alternative of constructing a station at that spot and our negotiations from now on must be conducted upon the basis of our being furnished with a station, which means that we should be permitted to come into Terminals' station."

Shortly thereafter and on February 2, 1928, the officials of Wheeling entered into an agreement with Terminals, consenting to the closing of Vinegar Hill, one of the streets upon which Wheeling's property abuts, and the temporary relocation of Ontario Street, and consented that Terminals take possession of a part of Wheeling's Ontario Street Passenger Station Site for the purpose of constructing a sub-

way into Huron Road, all of which work was contemplated by the plans for Terminals' union depot. (Exhibit 62) On February 21, 1928, this contract was supplemented, giving Terminals the right to occupy still another portion of Wheeling's Ontario Street Passenger Station Site for the same purpose. (Exhibit 63) On June 15, 1928 the same officials of Wheeling entered into a contract with Terminals consenting to the construction of abutments and wing walls for the purpose of supporting certain bridging over Canal Road which Terminals desired to construct for the purpose of supporting its tracks. In the same agreement Wheeling permitted Terminals to take possession of certain parts of its Ontario Street Passenger Station Site for the purpose of constructing thereunder two tunnels running from Ontario Street west to the plant of The Cleveland Electric Illuminating Company, which tunnels were being built for the purpose of housing electric cables and steam pipe lines, and was part of the work contemplated by Terminals' plans. (Exhibit 64)

On May 17, 1928 (Exhibits 94, 95, 96) the Interstate Commerce Commission issued and served complaints upon Central, Nickel Plate and B. & O. in which it was alleged that Central, Nickel Plate and B. & O. had acquired stock control of Wheeling contrary to the provisions of Section 7 of the Clayton Act, and The Commission required them to show cause why they should not dispossess themselves of the stock so acquired. A hearing was had upon these complaints and on the 11th day of March 1929 the Interstate Commerce Commission found that the acquisition of Wheeling stock by Central, Nickel Plate and B. & O. was illegal and in violation of the Clayton Act inasmuch as the effect thereof may be to substantially lessen competition. (*Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 152 I. C. C. 721.) Such order of divestiture was fully complied with on July 30, 1929 by depositing Wheeling's stock

with a trustee, appointed by the Commission, who is to hold the same pursuant to the terms of a trust agreement executed on July 30, 1929, the terms of which are not here material.

In the meantime and at the annual meeting of shareholders held May 23, 1928 (Exhibit 91), at which meeting five directors were to be elected, Central, Nickel Plate and B. & O. over the objection of appellant insisted upon and were granted the right as prior lien shareholders to elect as a class a majority of the directors to be elected at such meeting, and they thereupon elected three directors, electing three of the men whose terms expired by virtue of their election for one year at the May 25, 1927 annual meeting. Voting together with all of the other shareholders upon the remaining two directors to be elected, Central, Nickel Plate and B. & O. elected one of the two and the appellant, together with other shareholders, representing more than a majority of the outstanding preferred and common stock, elected the fifth director.

On July 3, 1928 (Exhibit 44), the Executive Committee of Wheeling, composed entirely of directors elected to office by B. & O., Central and Nickel Plate, passed a resolution resolving to recommend to the directors of Wheeling that Wheeling accept an offer of Terminals to furnish Wheeling with passenger station facilities in the new union depot of Terminals, when the same should be completed, for a period of twenty-five years at a rental of $20,000 per annum based upon 3,000 trains of not more than 14,000 cars, with an option to renew the right to use Terminals' station for a further period of twenty-five years at the same rental, excepting for such adjustments in the rental as may be justified on account of changes in operating cost directly applicable to the handling of Wheeling's trains and service, and in the meantime, in order that Terminals might

construct its easterly approach across Wheeling's property, that Wheeling accept Terminals' offer to provide Wheeling with temporary passenger station facilities, free of cost, in the Superior Avenue passenger station of Erie, all provided and subject, however, to an agreement to be made between Terminals and Wheeling as to the value of Wheeling's Ontario Street Passenger Station Site, which the Executive Committee further resolved to recommend to the directors be sold to Terminals for $1,600,000 (Exhibit 44, pp. 2, 3 & 4). Such recommendation was made to the directors by the Executive Committee on the 11th day of July 1928 (Exhibit 45) and a resolution (Exhibit 84. See also R. 289) was offered to the effect that the recommendations of the Executive Committee be adopted and approved and taken as the action of the board, and that the proper officers of Wheeling be authorized and directed to do any and all things necessary or proper to give effect to the action recommended by the Executive Committee. The directors elected by appellant interposed a protest to the adoption of this resolution and the meeting was adjourned until July 20, 1928. At the July 20, 1928 (Exhibit 46), meeting of the directors, and over the protest of the directors elected by appellant, it was resolved by the directors elected by Central and Nickel Plate that the officers of Wheeling be and they thereby were authorized and directed to enter into a contract with Terminals for the use of Terminals' railroad and union depot by Wheeling when, if and as the same should be completed, and, that pending the completion thereof and while Terminals was constructing its easterly approach across the property of Wheeling, Wheeling take up temporary station facilities at the Superior Avenue Passenger station of Erie. It was further resolved by the same directors and over the protest of the directors elected by appellant that the officers of Wheeling be and they thereby were authorized and directed to enter into an

agreement with Building (instead of Terminals as was proposed at the July 11th meeting) whereby Wheeling was to be given the option, at any time within a period of five years and upon ten days' written notice, to sell and convey its Ontario Street Station Site to Building for the consideration of $1,600,000, the payment of which sum to be guaranteed by The Vaness Company, a corporation controlled by Van Sweringens. (Exhibit 46) (R. 310)

At an adjourned meeting of the directors of Wheeling held on the 23rd day of November, 1928 (Exhibit 47), the Executive Committee reported that the contracts and agreements between Wheeling, Terminals and Building, authorized by the Directors on July 20, 1928, had not been executed by reason of the fact that certain changes were desired to be made in the agreement with Terminals for the use of Terminals' union depot, which changes the Executive Committee recommended that the directors authorize. Thereupon the directors elected by the votes of stock owned by Central and Nickel Plate and over the protest of the directors elected by the appellant passed a resolution authorizing the officers of the company to enter into a contract with Terminals in the form in which it was recommended to the meeting by the Executive Committee. (R. 287) All such contracts were authorized to be made subject to the approval of the Interstate Commerce Commission and/or the Public Utilities Commission of Ohio. (Exhibit 47)

Thereupon on December 7, 1928 the officers of Wheeling entered into the following agreements:

(a) An agreement with Big Four for the temporary use of a portion of its tracks which were necessary for Wheeling to use in order to reach the Superior Avenue Passenger Station of Erie. (Exhibit 17, R. 145, and see Exhibit 31)

(b) An agreement with Erie for the temporary use of Erie's Superior Avenue Passenger Station. (Exhibit 16, R. 134, and see Exhibit 31)

(c) An agreement with Terminals by the terms of which Terminals agrees to reimburse Wheeling for the amounts which Wheeling must pay Big Four and Erie for the temporary use of their tracks and Erie's Station. (Exhibit 18, R. 153) Building, because of its agreement with Terminals (Exhibit 49), agreed to reimburse Terminals for the amounts which it agreed to pay Wheeling under the agreement Exhibit 18. (Exhibit 67)

(d) An agreement with Building under the terms of which Wheeling is granted an option to sell its Ontario Street Passenger Station Site to Building at any time within five years for $1,600,000, the payment of which, in the event that Wheeling should exercise its option, is guaranteed by The Vaness Company, a Van Sweringen controlled company. (Exhibit 11) The agreement was drafted in this form for the reason that Wheeling did not want to obligate itself to sell its Ontario Street Passenger Station Site until it knew that it could use the union depot of Terminals under the agreement that had been prepared for that purpose. (R. 289, 290)

(e) An agreement with Terminals, referred to in these proceedings as the "user contract," under the terms of which Wheeling agrees to use the union depot of Terminals and Terminals agrees to furnish Wheeling with depot facilities for a period of one hundred years at an annual rental for the first twenty-five years of $20,000 for 3,000 trains of not more than 14,000 cars. (R. 121, Exhibit 15) Any increase in the number of trains or cars is to be paid for in the proportion which 3,000 or 14,000 bears to 20,000. At the end of the first twenty-five years Wheeling has an option (R. 127) to renew its user contract at the same rental

except that such an adjustment shall be made therein as may be justified on account of changes in operating costs directly applicable to the handling of Wheeling's trains and the furnishing of service to Wheeling. At the end of the second twenty-five year period Wheeling has the option (R. 128) of renewing the contract for a period of fifty years upon such terms and conditions as the parties may at that time agree upon. The user contract likewise gives Wheeling the right for any cause (R. 129) to terminate the same at the end of each five year period during the first fifty years by giving one year's notice of its intention so do do and if at any time Wheeling becomes dissatisfied with the service which it is receiving it may withdraw from the depot and in that event Terminals agrees to pay the cost up to $200,000 (exclusive of land) of building Wheeling a depot of its own. (R. 127) The user contract also provides that Terminals is to render Wheeling and its passengers such services (R. 122, 123) as are usually rendered by union depot companies including the furnishing of information by clerks, bulletin boards and otherwise as to the arrival and departure of Wheeling's trains; sale and accounting for all passenger tickets, the receiving, checking and delivery of baggage and the sale of and accounting for excess baggage checks; the receiving and transportation of United States mail, railway mail, newspapers, company materials and supplies; the receipt and delivery of milk in baggage cars and the loading of empty milk cans; the furnishing of ample space for the receipt, delivery and storage of express shipments.

On December 8, 1928 Wheeling filed with the Interstate Commerce Commission in Finance Docket 7298 an application for a Certificate of Public Convenience and Necessity, under Paragraphs 18 to 20 inclusive of Section 1 of the Interstate Commerce Act, authorizing it to operate in passenger and allied services for a period of one hundred

years, a proposed connecting track and passing siding of Terminals; to acquire for a period of one hundred years passenger station facilities in the union depot of Terminals and to operate temporarily a portion of an industrial siding track and tracks and station facilities of Erie and tracks of Big Four. (R. 111)

On the same day Wheeling filed with the Interstate Commerce Commission in Finance Docket 7299 an application for a Certificate of Public Convenience and Necessity, under Paragraphs 18 to 20 inclusive of Section 1 of the Interstate Commerce Act, authorizing it to abandon a portion of its line of railroad including its Ontario Street Passenger Station in the City of Cleveland, Ohio. (R. 176)

On January 17, 1929 (R. 197), appellant secured leave to intervene and filed intervening petitions in both Finance Dockets 7298 and 7299 protesting the granting of the authority and certificates sought by Wheeling. (R. 198) The applications were consolidated and set for hearing January 21, 1929. At that time appellant filed supplemental intervening petitions in both Finance Dockets 7298 and 7299. (R. 200)

On December 12, 1928 Wheeling filed an application (Exhibit 29) with The Public Utilities Commission of Ohio for authority to abandon its Ontario Street Passenger Station and a portion of its line of railroad in the City of Cleveland, Ohio. On the same day the Public Utilities Commission dismissed this application for want of jurisdiction. (Exhibit 30) From this order of the Utilities Commission error was prosecuted by the appellant to the Supreme Court of Ohio and the order of the Public Utilities Commission was affirmed upon the grounds that matters relating to the abandonment or extension of facilities are within the exclusive jurisdiction of the Interstate Commerce Commission. (*The Pittsburgh & West Virginia Railway Company*

v. The Public Utilities Commission of Ohio, 120 O. S. 434, Exhibit 81.)

In the course of the hearing had before Examiner T. F. Sullivan of the Interstate Commerce Commission, certain testimony offered by appellant was excluded and an adjournment was taken January 24, 1929, following which the appellant appealed from the rulings of the Examiner to Division 4 of the Commission. This appeal was sustained (R. 205) and Wheeling then appealed to the full Commission which denied Wheeling's appeal (R. 207) and set Wheeling's applications in Finance Dockets 7298 and 7299 for further hearing on May 13, 1929. When the hearing was resumed Terminals secured leave to intervene (R. 293) and filed intervening petitions (R. 207, 212) in support of the applications and authority sought by Wheeling.

Wheeling's Ontario Street Passenger Station building was one of wood and stucco construction (R. 226), built in 1909, during the receivership of one of Wheeling's predecessors and under a permit from the City of Cleveland which required its removal within one year. (Exhibit 6) It was not removed and in July 1928 the management of Wheeling (Exhibit 48) and Wheeling's engineers (Exhibit 7) reported to the directors and executive committee that it still had an estimated life of from three to five years. At the hearing had before the Interstate Commerce Commission in Finance Dockets 7298 and 7299, Wheeling, on January 22, 1929, called as a witness Mr. Crutsinger, (R. 270) an independent engineer, to testify to the condition of its passenger station building. Apparently surprised at the condition in which Mr. Crutsinger found the building, Wheeling made application to Division 6 of the Commission for an emergency service order authorizing Wheeling to temporarily cease the use of its Ontario Street Passenger Station building and to take up passenger station service at the Superior Avenue passenger station of Erie. This applica-

tion was granted but without prejudice to the rights of the parties interested in Finance Dockets 7298 and 7299. Thereafter and without further action on the part of the Commission, Wheeling demolished its passenger station building. Soon thereafter Wheeling proposed to enter into an agreement with Terminals giving Terminals the right to go upon Wheeling's Ontario Street Passenger Station Site, excavate the same some fifteen or more feet in depth, and otherwise prepare it for use by Terminals except that Terminals was not to lay its tracks thereon, with the agreement upon the part of Terminals that such right was to terminate if the Interstate Commerce Commission did not grant Wheeling the authority and certificates sought by it in Finance Dockets 7298 and 7299, in which event, all improvements placed thereon by Terminals were to become the property of Wheeling or at Wheeling's option Terminals was to restore the property to its original condition. Appellant sought to enjoin the execution of this agreement and on May 16, 1929 the execution thereof was enjoined by the United States District Court for the Northern District of Ohio upon the grounds (opinion unreported) that the same was in effect an abandonment by Wheeling of its property for which it had obtained no certificate of public convenience and necessity from the Interstate Commerce Commission. Upon appeal the Circuit Court of Appeals, on June 8, 1929, reversed the District Court and dissolved the injunction. (*Wheeling & Lake Erie Ry. Co. et al. v. The Pittsburgh & West Virginia Ry. Co.*, 33 Fed. 2nd, 390.) A petition for a writ of certiorari filed in this Court was denied October 21, 1929. (*Pittsburgh & West Virginia Ry. Co. v. Wheeling & Lake Erie Ry. Co.*, October Term 1929, No. 401, 280 U. S. ....)

Wheeling operates four passenger trains into Cleveland on week days, three trains on Sunday (R. 221) and three outbound trains daily. (R. 222) This makes a total,

not including excursion trains (R. 252), of 2503 trains per annum with an average number of 3.3 cars per train. (R. 222) It operates about 25 excursion trains per year with from five to eight cars per train. (R. 252) Wheeling handles 94,164 revenue passengers a year at its Ontario Street Passenger Station, exclusive of passengers handled by excursion trains. (R. 223) This is 33.26% of its total revenue passengers amounting to 283,054. Its total passenger revenue in the year 1928 was $314,060.82 (R. 224), 26.12% of which, or $82,030.83, was received from the outbound revenue passengers at its Ontario Street Station. (R. 223) Wheeling likewise handles at its Ontario Street Station 271 pieces of outbound express per day, of an average aggregate weight of 13,139 pounds. (R. 223) Inbound shipments are the same (R. 223), making a total of 542 pieces of express per day of an average daily aggregate weight of 26,278 pounds. On an annual basis this amounts to 197,830 express shipments of an aggregate weight of 9,629,430 pounds. (R. 223) Wheeling's Ontario Street Passenger Station also handles about 1212 tons of mail per year. (R. 223)

The user contract (R. 121) requires Terminals to handle 3,000 trains of not more than 14,000 cars, all of Wheeling's passengers, express, mail, milk, baggage, railway mail, newspapers, company materials and supplies. In addition, Terminals must acquire a strip of land for the purpose of building thereon at a cost of $93,500 (R. 390), a connecting track between the proposed tracks of Terminals and the tracks of Wheeling. This connecting track is shown in green on Exhibit 31, and Terminals' electric locomotives will haul Wheeling's trains from this connecting track a distance of some 2000 feet into the station, on an inbound movement, and from the station out to the connecting track, a distance of 2000 feet, on an outbound movement. All this is to be done by Terminals at a pur-

ported rental of $20,000 per annum. This figure of $20,000 per annum is an arbitrary one and one that was fixed by Mr. Duncan and Mr. Durham, President and General Manager respectively of Wheeling, after a study of the cost of operating Wheeling's Ontario Street Passenger Station, (R. 251, 285, 290, 291), as the most which Wheeling could afford to pay. That it cannot afford to pay more than $20,000 per annum is admitted in Wheeling's answer. (R. 78) In 1920 when Mr. Van Sweringen was attempting to induce Wheeling to use the union depot of Terminals Mr. Van Sweringen took the position that Wheeling should bear its proportionate share of the cost upon a per car basis. As it was then estimated that Terminals' union depot would cost $60,000,000 (R. 277), Wheeling's proportion was figured at $175,000 to $225,000 per annum, *not including Wheeling's proportionate share of maintenance and operation.* (R. 277)

Terminals' union depot consists of a station area located at the southwest corner of the Public Square, a westerly approach leading from the station area to West 37th Street, a distance of about two miles, and an easterly approach, leading from the station area to East 40th Street, a distance of about two miles. (R. 261, 393) In handling the trains of Central and Nickel Plate, Terminals will haul them over the east and west approaches and to points beyond. The trains of Big Four will be handled in and out over the west approach only and to a point beyond the west approach. (R. 393) In the Union Passenger Terminal Agreement (Exhibit 69, pp. 15 and 18), Central, Big Four and Nickel Plate agreed to divide between them upon a per car basis all of Terminals' capital charges and the cost, other than that of the electrification system, of maintaining and operating Terminals' depot. The cost of the electrification system is to be kept separately and divided between them in that proportion which their individual use thereof

bears to the total use thereof to be measured in ton miles, car miles, engine miles or some other agreed service unit. (R. 393) It was at first testified that the total number of trains operated into and out of Cleveland per day by Central, Big Four and Nickel Plate amounted to fifty-five. (R. 242) It was later explained that in making this calculation, train sections were ignored. (R. 480, Exhibit 153) Counting train sections, Central, Big Four and Nickel Plate have 115 trains per day with an average of ten cars per train. (R. 308, Exhibit 120) On this basis and after making an allowance for differences in service, to-wit, that Wheeling will use only the station area and about 2000 feet of the easterly approach, Wheeling, if it were to pay a non-discriminatory, nonpreferential rate would have to pay for the use of Terminals' facilities $128,740.44 per year on a per car basis, or $331,776.74 per year on a per train basis. (Exhibit 155) *This evidence is undisputed,* but was sought to be overcome by testimony offered by Terminals tending to show that the estimated *out-of-pocket cost* to it for 2503 trains (not 3000 trains) and which does not include Wheeling's 25 excursion trains was $19,110 per year (R. 388), *not including* the cost of receiving and dispatching United States mail, railroad mail, newspapers, company materials and supplies, the cost of receiving and delivering milk in baggage cars and the loading of empty milk cans, the cost of furnishing space for the receipt, delivery and storage of express shipments or of furnishing information by clerks, bulletin boards, notices and otherwise as to the arrival and departure of Wheeling's trains, the cost of a dispatcher, or the cost of operating signal towers and interlocking devices. (R. 392) Thus, if Wheeling is permitted to do that which it seeks to do and if it can be made to pay a non-discriminatory, non-preferential rate for the use of Terminals' facilities, Wheeling will find itself burdened with an obliga-

tion which it admittedly cannot afford to pay, its present favorably located passenger station site will be gone and it will be either compelled to carry a burden, which it admits it cannot afford to carry, or seek passenger station facilities in downtown Cleveland in some place not as favorably located as its present station site.

The area of Wheeling's Ontario Street Passenger Station Site as it originally existed contained 74,780 square feet of land owned in fee and 5,677 square feet of land held under a ninety-nine year lease (Exhibit 4) which expires April 25, 1991. (Exhibit 48 and Exhibit 1 attached thereto.) The property owned in fee is shown in yellow on Exhibit 1 attached to Exhibit 48, while the property under lease is outlined in brown. The plans for the construction of Terminals' depot calls for the vacation of certain streets upon which the property of Wheeling abuts, and the amount of property which Wheeling claimed would revert to it by reason of the vacation of these streets is shown in green on Exhibit 2 attached to Exhibit 48. Exhibit 3 attached to Exhibit 48 shows the various parcels over which a dispute arose between the management of Wheeling and the management of Terminals as to which one was entitled thereto. This dispute was adjusted by awarding to Wheeling the property outlined in yellow on Exhibit 4 attached to Exhibit 48, and by considering Wheeling to be the owner thereof in fee. As so adjusted Wheeling was awarded what is called a building area of 74,515.5 square feet, having a frontage of 97 feet on Huron Road relocated and a frontage on Ontario Street of 492.83 feet, running back from Huron Road and Ontario Street to Canal Road. Wheeling was also awarded what is called a right of way area consisting of 34,826.1 square feet, making a total in all of 109,341.6 square feet. Wheeling had this property appraised by three real estate men (R. 463, 469, 476, Exhibits 148, 149, 150), and adopted the

highest appraisal of $1,600,000 as the basis upon which it would sell the same to Terminals. In arriving at this figure of $1,600,000 no consideration was given by Wheeling to the fact that it was to receive terminal facilities from Terminals at the rate of $20,000 per year, but the two figures, that of $20,000 per year specified in the user contract and that of $1,600,000 specified in the option to sell, were absolutely independent of each other. (R. 291) Appellant offered testimony before the Interstate Commerce Commission to the effect that the fair reasonable value of Wheeling's lands as shown on Exhibit 4 of Exhibit 48 was in excess of $7,000,000. (R. 324, 344)

The Interstate Commerce Commission, on July 23, 1929, made public its report and certificates in Finance Dockets 7298 and 7299, granting Wheeling the authority therein prayed for. (R. 38) The certificates so granted were dated July 9, 1929, and by their terms became effective thirty days from and after the date thereof. On August 3, 1929, appellant filed with the Commission a petition for rehearing, which the Commission denied on August 8, 1929. (R. 483)

On August 7, 1929, appellant filed its bill of complaint below (R. 497), seeking to enjoin the order of the Interstate Commerce Commission in Finance Dockets 7298 and 7299, filing at the same time a motion for a temporary and preliminary injunction. (R. 62) Subsequently, on August 21, 1929, appellant filed its amended bill of complaint. (R. 1) The matter came on for hearing on September 10, 1929, before the Honorable A. C. Denison and Smith Hickenlooper, Circuit Judges, and Paul Jones, District Judge. On December 11, 1929 (R. 486), the District Court refused to enjoin the order of the Interstate Commerce Commission and dismissed appellant's amended bill of complaint. On January 2, 1930, a petition to appeal (R. 500) and an assignment of errors (R. 501)

were filed by appellant with the court below, and the appeal was allowed by the court (R. 507) and bond was given as required.

Appellant's line of railroad extends from Pittsburgh, Pennsylvania, to Pittsburgh Junction, Ohio, and it connects with the lines of Wheeling at Mingo Junction and at Pittsburgh Junction, Ohio. (Exhibit 1) For many years past it has had interchange agreements with Wheeling and by reason thereof a through route and channel of trade and commerce has been established between the lake ports served by Wheeling at Toledo, Huron, Lorain and Cleveland, Ohio, and Pittsburgh, Pennsylvania. For several years appellant has been proposing the construction of a line of railroad extending from its lines at Cochrans Mill, Pennsylvania, to Connellsville, Pennsylvania, connecting at the latter point with lines of the Western Maryland which lead from Connellsville to Baltimore, Maryland. (Exhibit 1) The Interstate Commerce Commission on June 12th, 1928, authorized the building of such extension and the same is now under construction (*Proposed Construction of Extension by The Pittsburgh & West Virginia Ry. Co.*, 138 I. C. C. 755), and when completed there will be established by means of the lines of Wheeling, appellant and Western Maryland the shortest and most direct route and channel of trade and commerce from Toledo, Huron, Lorain and Cleveland, Ohio, and intermediate points to the Atlantic Sea Board at Baltimore, Maryland. Appellant is likewise seeking to acquire control of Wheeling and The Western Maryland Railway Company, having filed with the Commission applications for authority so to do. Such applications are now pending in Finance Dockets 6486 and 7415. In the recent report of the Interstate Commerce Commission, the Commission, in formulating its plan for the consolidation of the railroads of the United States into a limited number of competitive systems, has sug-

gested the consolidation of the lines of Wheeling, Western Maryland and appellant into what is therein referred to as the seventh system, to be absolutely free from any domination or control by Central, Nickel Plate or B. & O. (*In the matter of Consolidation of the Railway Properties of the United States into a Limited Number of Systems,* 159 I. C. C. 522) Thus appellant is vitally interested in the proper determination of the issues here presented, not only because it is a substantial stockholder of Wheeling and because it and its officers represent a majority of the common and preferred shares of Wheeling, but it is also vitally interested, should it acquire control of Wheeling or should the plans of the Commission materialize, in having Wheeling maintain its favorably located passenger station site in the City of Cleveland and in not having Wheeling burdened with an obligation for terminal facilities which it admittedly cannot afford.

SPECIFICATIONS OF ERROR.

It is respectfully submitted that:

I. The District Court and the Interstate Commerce Commission erred in failing to find and hold that Terminals is an interstate and/or intrastate common carrier for hire subject

A. To regulation by the Interstate Commerce Commission and/or

B. To regulation by the Public Utilities Commission of Ohio; and

C. As such it must file tariffs, it cannot make preferential contracts, and cannot grant rebates.

II. The District Court and the Interstate Commerce Commission erred in finding and holding that Terminals and Wheeling could agree as between themselves upon the

terms of their joint use of the terminal facilities of Terminals without regulation by the Interstate Commerce Commission.

III. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the contract under which Wheeling proposes to use the terminal facilities of Terminals is illegal in that it

A. Is not in accord with any filed tariff or schedule.

B. Is unjustly preferential and discriminatory.

C. Provides for a rebate.

IV. The District Court erred in failing to find and hold that the report and findings of the Interstate Commerce Commission re points I, II, and III hereof are

A. Without warrant in law and contrary to law.

B. Arbitrary in that the Interstate Commerce Commission ignored the testimony offered in respect thereto.

V. The District Court erred in finding and holding that the contract under which Wheeling proposes to use the terminal facilities of Terminals and the option which Wheeling has to sell its Ontario Street Passenger Station Site to Building are wholly inter-dependent and must be considered as one and the consideration as single, and that when so considered, together with the financial condition of and the strategic position occupied by Wheeling, there is no unjust preference and discrimination in the contract under which Wheeling proposes to use the terminal facilities of Terminals.

VI. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the rental of $20,000 per annum specified in the contract under which Wheeling proposes to use the terminal facilities of Terminals is subject to change.

VII. The District Court and The Interstate Commerce Commission erred in failing to find and hold that, inasmuch as the contract under which Wheeling proposes to use the terminal facilities of Terminals and the option contract under which Wheeling proposes to sell its property to Building were authorized by directors who held their office by virtue of the votes of stock held by Central, B. & O. and Nickel Plate, which stock had been acquired without the consent of the Interstate Commerce Commission and contrary to Section 7 of the Clayton Act and Section 8683 of the General Code of Ohio, for the purpose of stifling competition and of forcing Wheeling to use the terminal facilities of Terminals and of enabling Building to acquire Wheeling's property, the same were unlawful and illegal and the Interstate Commerce Commission did have jurisdiction to inquire into the same and because thereof refuse to issue its certificates of public convenience and necessity therefor.

VIII. The District Court and the Interstate Commerce Commission erred in failing to find and hold that that for which Wheeling sought certificates of public convenience and necessity and the action which Wheeling proposes to take pursuant thereto was and is unlawful and illegal for want of stockholders' consent in that

A. It provides for a change in the termini of Wheeling, to which stockholders' consent is required by Section 8747 of the General Code of Ohio.

B. It is an aid and a sale of part of a railroad to another railroad and a lease of a part of a railroad to another railroad, to which stockholders' consent is required by Section 8809 of the General Code of Ohio.

C. It is an extension of the line of railroad of Wheeling, to which stockholders' consent is required by Section 8772 of the General Code of Ohio.

IX. The District Court erred in finding and holding that the requirements of the statutes of the State of Ohio requiring stockholders' consent to that which Wheeling now proposes to do must yield to the paramount control of Congress and the Federal Government over interstate commerce.

X. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the consideration of $1,600,000, specified in the option which Wheeling has to sell its property to Building, is inadequate.

XI. The District Court and the Interstate Commerce Commission erred in failing to find and hold that Wheeling has not had the benefit and judgment of a disinterested directorate.

XII. The District Court and the Interstate Commerce Commission erred in failing to find and hold that the Interstate Commerce Commission did have jurisdiction to consider and apply the statutes of the State of Ohio and the general principles of law involved in points VIII, X and XI hereof.

XIII. The District Court erred in finding and holding that the questions raised under points VIII, X and XI hereof constitute alleged private grievances as between the appellant and Wheeling in which the other appellees are but indirectly and collaterally interested, if at all, and that such separate and severable causes of actions cannot properly be joined, collaterally raised or considered by the court in an action to set aside and annul an order of the Interstate Commerce Commission.

XIV. The District Court erred in refusing to admit into evidence certain testimony offered by the appellant in support of questions raised in points VIII, X and XI

hereof and in effect sustaining a motion to dismiss as to such issues.

XV. The District Court and the Interstate Commerce Commission erred in holding and finding that the public interest required or permitted Wheeling to take up passenger station facilities in the union depot of Terminals and to abandon its Ontario Street Passenger Station Site.

ARGUMENT.

POINT I. TERMINALS IS A COMMON CARRIER.

A—Under the Interstate Commerce Act.

Section 1, Title 49 U. S. C. insofar as the same is here applicable provides:

"(1) *Carriers subject to regulation*—The provisions of this chapter shall apply to *common carriers* engaged in—

(a) *The transportation* of passengers or property wholly by *railroad* or * * *

(b) * * * * *

(c) * * * * *

(2) *Transportation subject to regulation*—The provision of this chapter shall also apply to such *transportation* of passengers and property * * * but only insofar as such *transportation* * * * takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) * * * * *

(c) * * * * *" (Italics ours.)

Analyzing these provisions of the Code there can be no question but what the Interstate Commerce Act applies not only to *common carriers* engaged in the *transporta-*

tion of passengers or property wholly by *railroad* but that it likewise applies to *such transportation* of passengers and property when such transportation is interstate.

What is meant by the words "common carrier," "transportation" and "railroad"?

Section 1, Title 49 U. S. C. further provides:

> "(3) *Definitions—The term 'common carrier'* as used in this chapter shall include * * *; all persons, natural or artificial, engaged in *such transportation* * * * as common carriers for hire. * * * The term 'railroad' as used in this chapter shall include * * * all the road in use by any common carrier operating a railroad whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, *terminals, and terminal facilities of every kind* used or necessary in the *transportation* of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the *transportation* or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, * * * and all instrumentalities and facilities of shipment or carriage irrespective of *ownership* or of any *contract, express or implied, for the use thereof,* and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported." (Italics ours.)

From these definitions it is clear that any person operating *locomotives* or other instrumentalities and *facilities* for the shipment or carriage of interstate passengers or property is engaged in *transportation* within the meaning of the act. It is equally clear that, if the person operating such *locomotives* or other instrumentalities and *facilities* of shipment or carriage (*transportation*) is operating a *terminal* and *terminal facilities,* then such person is a *railroad.* The act does not seem to define who are "common carriers" insofar as that term is applicable to transporta-

tion wholly by railroad. In effect it says that all persons engaged as common carriers for hire in the operation of locomotives or instrumentalities and facilities for the shipment of interstate passengers or property ("such transportation") are common carriers. This definition leaves open to question as to who are "common carriers for hire." There being no other definition of the term in the act, its meaning must be ascertained by its common law use and application.

Manufacturers Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 21 I. C. C. 304;

Crane Iron Works v. Central R. of New Jersey, 17 I. C. C. 514;

Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co., 17 I. C. C. 338;

Solvay Process Co. v. Delaware, L. & W. R. Co., 14 I. C. C. 246;

General Elec. Co. v. New York Cent. & H. R. R. Co., 14 I. C. C. 237.

Under the common law a common carrier is a person who undertakes to transport for hire from one place to another, passengers or the goods of those who choose to employ him.

In *Washington ex rel. v. Kuykendall*, 275 U. S. 207, the court in its second syllabus said:

> "One who undertakes for hire to transport from place to place property of others who may choose to employ him is a common carrier."

To the same effect see:

United States v. Union Stock Yard & Transit Co. of Chicago, 226 U. S. 286;

Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;

Nordgard v. Marysville & N. R. Co., 134 C. C. A. 415, 218 Fed. 737;

Bay v. Merrill & Ring Lumber Co., 211 Fed. 717;

United States v. St. Joseph Stockyards Co., 181 Fed. 625;

Union Stockyards Co. of Omaha v. United States, 94 C. C. A. 626, 169 Fed. 404.

Hutchison on Carriers, 3rd edition, Vol. 1, Sec. 48, p. 42, says:

> "To bring a person, therefore, within the description of a common carrier the following characteristics must appear: 1. He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. 2. He must undertake to carry goods of the kind to which his business is confined. 3. He must undertake to carry by the methods by which his business is conducted and over his established road. 4. The transportation must be for hire. 5. An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms."

Applying this definition to the statute in question, a person who operates a *terminal* and *terminal facilities* (railroad) and who in the operation thereof uses *locomotives* or *other instrumentalities* and *facilities* for the shipment of interstate passengers or property (transportation) in order to transport from one place to another the property of others who may choose to employ him and who does so for hire, is a common carrier subject to the Interstate Commerce Act. Is Terminals such a person? From its articles of incorporation (Exhibit 68) we learn that:

> "Said corporation is formed for the purpose of purchasing or leasing depot grounds, and locating, constructing and maintaining a *common* or *union station*

house, passenger or freight depot, or both, and terminal and connecting tracks for the use of *steam railroads,* or both steam and electric railroads, and for constructing, maintaining and operating in connection with its terminals and station, a terminal railroad with two or more tracks connecting the railroads of one or more companies, and also in connection therewith for constructing and maintaining warehouses, stores, office buildings, hotels and other structures for the accommodation of the public, and operating, or leasing the same." (Italics ours.)

In the initiated ordinance No. 47814 (Exhibit 110) which it is admitted was initiated by Van Sweringens and Terminals and which is the ordinance of the City of Cleveland under which the terminal is being built, it is recited:

"* * * Whereas, it is deemed advisable that a *union* passenger depot should be constructed for the mutual accommodation and convenience of the *people of the City of Cleveland and the various steam and electric lines entering the City,* designed and adequate for the present and future requirements of said lines, centrally located adjoining the southwest corner of the Public Square, convenient and accessible *to the traveling public* by the local surface and proposed subway lines under the Public Square, and * * *

"Whereas, the facilities to be constructed by The Cleveland Union Terminals Company are believed to be suitable, adequate and desirable for the present and future needs of *said railroad companies, as well as the other steam railroads* entering said City, and * * *" (Italics ours.)

And Section 91-3 of this ordinance provides:

"In order that the passenger depot facilities of the Terminals Company may be open to *any and all steam, interurban and suburban railroads as a depot facility,* to the extent that the capacity of such depot facilities will afford, with due regard for future expansion of the use of said facilities by the then users

thereof, the Terminals Company, when its tracks and the *tracks of any such steam, interurban or suburban* cross, connect or intersect, *the company owning such steam, interurban and suburban railroad,* may connect the tracks of said railroads so crossing, connecting or intersecting, with such tracks of the Terminals Company as shall be set aside by said Terminals Company *for similar service as that of the respective railroads so crossing, connecting or intersecting,* and the Terminals Company *shall cooperate in securing such physical connection,* so as to permit the passage of cars of similar service from the tracks of such railroad to the tracks of the Terminals Company, and when such connection shall be made, the said Terminals Company *shall operate, or permit the operation,* as it shall elect, of the cars of such steam, interurban or suburban railroad, upon such terms, conditions, and for such consideration as shall be mutually agreed upon with said steam, interurban or suburban railroad, and said Terminals Company." (Italics ours.)

In the Union Passenger Terminal Agreement (Exhibit 69) whereby Central, Big Four and Nickel Plate agreed to use the terminal facilities of Terminals, it is recited:

"The Terminals Company has been incorporated, has acquired the right to, and proposes to, construct and complete a union passenger terminal in the vicinity of the southwest corner of the Public Square, in the City of Cleveland, Ohio, together with the approaches thereto. Such passenger terminal and approaches, the lands upon which the same are situated, and all the tracks, buildings, electrification system within and outside of the terminal limits, and other structures, as hereinafter described, or shown on the plans hereinafter referred to, necessary to constitute a modern union passenger terminal for the use of *such of the railroads and railways using steam, electric, or other motive power, now or hereafter entering or operating in said City as may desire to use the same,* in ac-

cordance with and subject to the provisions hereof, are hereinafter called the 'Passenger Terminal'." (Italics ours.)

Thus Terminals has *professed to serve* all who choose to use its facilities. That it is considered in law as a public or *quasi-public* corporation is shown by Section 9163 of the General Code of Ohio, wherein it is granted the right of eminent domain. From its answer filed herein (Paragraph 17, R. 88) we learn that it has exercised such sovereign power, a power which we all know can be exercised only for a "public use."

From the user contract in question (Section 2, R. 124) and from the Union Passenger Terminal Agreement (Exhibit 69, pp. 9, 10, 15 and 17) the services to be rendered by Terminals are to be paid for by Wheeling, Central, Big Four and Nickel Plate. Consequently Terminals is a "common carrier for hire."

That Terminals will engage in *transportation* within the meaning of the Act, is established by the user contract in question (R. 122), the Union Passenger Terminal Agreement (Exhibit 69, p. 4) and the testimony of Mr. Jouett, Chief Engineer for Terminals. (R. 388, *et seq.*) Here we learn that Terminals will operate twenty-two locomotives (R. 390) to haul the trains of Wheeling (R. 390; and R. 122), Central, Big Four and Nickel Plate into and out of the station, that it will sell tickets, furnish information as to the arrival and departure of trains and will receive, check, deliver and dispatch baggage, mail, milk and express shipments and furnish such other facilities and service as are usually furnished at passenger stations. Such transportation will be interstate for it includes all the passenger trains of Central, Big Four, Nickel Plate and Wheeling which either enter or leave Cleveland (Exhibit 120 and R. 306), and Central, Big Four, Nickel Plate and

Wheeling are admittedly interstate common carriers. Furthermore, in the contract here in question (R. 124) it is provided:

> "* * * for a total of not more than 3000 trains containing in the aggregate not more than 14,000 cars to or from the Passenger Terminal from points of origin or to points of destination on the present lines of the Wheeling Company and moving over the same, or to or from Pittsburgh or Connellsville or points between Pittsburgh or Connellsville and the present lines of the Wheeling Company, on lines constructed, acquired, controlled or operated by the Wheeling Company extending from Pittsburgh or Connellsville, or points westerly thereof, to a connection or connections with the present lines of the Wheeling Company at Jewett, Ohio, or points southerly or easterly thereof and moving over said Wheeling Company's lines, * * *.
>
> "The Wheeling Company's trains may also include cars from points of origin or to points of destination on extensions of or on lines connecting with the present lines of the Wheeling Company other than Pittsburgh and Connellsville and points westerly thereof as aforesaid, which cars handled into or through the Passenger Terminal shall be paid for upon the same per car basis from time to time as the cars handled into or through the Passenger Terminal for the account of the proprietary railroad companies of the Passenger Terminal."

That terminal companies performing the services which Terminals has contracted to perform is a common carrier subject to regulation by the Interstate Commerce Commission is shown by the following cases.

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, the court in its second syllabus said:

> "A corporation created to carry on, conformably to a municipal ordinance and a confirmatory statute

intended to secure public shipping facilities, a wharfage business at a seaport, and to furnish terminal facilities for a railway and steamship system of which it forms a part and by which it is controlled through a holding company, is a common carrier, and as such is subject to the jurisdiction of the Interstate Commerce Commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences."

In *Terminal Railroad Association v. The United States,* 266 U. S. 17, the court in speaking of The Terminal Railroad Association of St. Louis said on page 31:

"The Terminal Association and its subsidiaries are common carriers by railroad, and, like the proprietary companies, are subject to regulation by the Commission."

Roberts in his treatise on *Federal Liabilities of Carriers,* 2nd Ed. Vol. 1, p. 355, Sec. 126, says:

"*Status of terminal railroads and belt lines participating in movement of interstate traffic.* Terminal and belt railroads hauling traffic between the termini of trunk lines and industries are common carriers within the meaning of the Act if they participate to any extent in the movement of interstate or foreign shipments.

"The length of a railroad is entirely immaterial in determining whether it is a common carrier engaged in interstate commerce. In fact, the Act itself defines a railroad as including all switches, tracks and terminal facilities used or necessary in the transportation of persons or property. This necessarily includes a railroad confined strictly within the boundaries of a single city or county. For example, a stock yards company which owned terminal facilities for transporting interstate shipments from trunk lines to the stock yards at Chicago and its lessee which operated and hauled the cars over such railroad, were both held to

be common carriers and amenable to all the provisions of the Interstate Commerce Act. The fact that neither of them issued through bills of lading was not controlling; for it is the character of the service and not the manner of hauling that determines their interstate status.

"Similarly a company which furnished terminal facilities for truck lines and a steamship system of which it formed a part, was held to be a common carrier and under the control of the Interstate Commerce Commission to the extent that the commerce handled by it was interstate. To hold that such companies are not within the purview of the Act would enable the railroad companies to exempt their terminal facilities from the control of the Interstate Commerce Commission by organizing separate corporations."

To the same effect see:

U. S. v. Atlanta Terminal Co., 260 Fed. 779;
U. S. v. Terminal District, 249 U. S. 296.

That Terminals has considered itself to be a common carrier subject to the Act is shown by its applications filed with the Interstate Commerce Commission pursuant to Section 20a of the Act for authority to issue its stock and bonds. (*In re Cleveland Union Terminals Stocks and Bonds*, 71 I. C. C. 842; 79 I. C. C. 664 and 761; 99 I. C. C. 176; 138 I. C. C. 55.) In each of these cases and in granting the authority therein sought, the Commission said:

"The Cleveland Union Terminals Company, hereinafter called the Terminals Company, a corporation organized for the purpose of engaging in transportation by railroad subject to the Interstate Commerce Act * * *."

It is therefore respectfully submitted that Terminals is a common carrier engaged in the transportation of interstate passengers and property wholly by railroad, and

that it is consequently subject to the provisions of the Interstate Commerce Act and to regulation by the Interstate Commerce Commission,—that the District Court and The Interstate Commerce Commission erred in failing to so find.

B—Under Section 501 of the General Code of Ohio.

It is admitted that Terminals is a union depot company organized under the laws of the State of Ohio. Section 501 of the General Code of Ohio provides as follows:

> "*'Railroad' defined; other companies.*—The term 'railroad' as used in this chapter shall include all corporations, companies, individuals, associations of individuals, their lessees, trustees, or receivers appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, or which owns, operates, manages or controls *any cars or other equipment* used thereon, or which owns, operates, manages or controls any bridges, *terminals, union depots,* side tracks, docks, wharves, or storage elevators used in connection therewith, whether owned by such railroad or otherwise. Such term 'railroad' shall mean and embrace express companies, water transportation companies and interurban railroad companies, and all duties required of and penalties imposed upon a railroad or an officer or agent thereof insofar as they are applicable, shall be required of and imposed upon express companies, water transportation companies and interurban railroad companies, their officers and agents. The commission shall have the power of supervision and control of express companies, water transportation companies and interurban railroad companies to the same extent as railroads." (Italics ours.)

While it is true that a corporation cannot by mere legislative fiat be classed as a public service corporation and thereby made subject to regulation by the State, yet

as we have seen, Terminals in its articles of incorporation (Exhibit 68) and in the initiated ordinance (Exhibit 110), pursuant to the terms of which it is building its depot, and in the Union Passenger Terminal Agreement (Exhibit 69) has professed to serve all those who choose to use its facilities. By reason of Section 9163 of the General Code of Ohio it is granted the right of eminent domain and from its answer filed herein (Paragraph 17, R. 88) we learn that it has exercised such sovereign power, a power which can be exercised only for a public use. It therefore is a public service corporation, and if as hereinabove pointed out, it is not or should not for any reason be subject to the Interstate Commerce Act and regulation by the Interstate Commerce Commission, it is subject to the jurisdiction of and regulation by the Public Utilities Commission of Ohio.

C—Terminals Must File Tariffs, Can Not Make Preferential Contracts or Grant Rebates.

Paragraph 7 of Section 6 of Title 49 U. S. C. provides:

"*Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates,

fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 2 of Title 49 U. S. C. provides:

"*Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Paragraph 1 of Section 3 of Title 49 U. S. C. provides:

"*Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph 3 of Section 3 of Title 49 U. S. C. provides:

"*Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject

to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Under these provisions of the Act there can be no question but what Terminals must file tariffs and schedules with the Commission; that it cannot discriminate in its rates and charges but must exact from all the same toll for similar services, and that it cannot give or grant rebates. This conclusion is strengthened beyond question by the provisions of Paragraph 1 of Section 15(a) Title 49, U. S. C., which provides:

"*Definitions.* When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this chapter, excluding (a) * * * (b) * * * (c) * * * (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents."

The express exclusion of terminal companies owned exclusively by political subdivisions shows conclusively that Congress intended the Commission to have and that it does have jurisdiction over the rates, fares and charges of terminal companies that are not owned by political sub-

divisions. Moreover, the courts have removed all doubt upon the question. In *The Chicago Junction* case, 264 U. S. 257, in which was involved the right of the Baltimore & Ohio and other carriers to use certain terminal tracks which suddenly passed into the control of the New York Central, the court said on page 267:

> "This loss is not the incident of more effective competition. Compare *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 148, *ante*, 216, 220, 44 Sup. Ct. Rep. 72. It is injury inflicted by denying to the plaintiffs *equality of treatment*. To *such treatment carriers* are, under the Interstate Commerce Act, *as fully entitled as any shipper. Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, P. U. R. 1915 B. 261, 35 Sup. Ct. Rep. 370. It is true that, before Transportation Act 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And, by reason of a provision then contained in Section 3 of the Interstate Commerce Act, the purchase *might have enabled* the New York Central to *exclude all other carriers* from use of the terminals. Compare *Louisville & N. R. Co. v. United States*, 242 U. S. 60, 61 L. Ed. 152, 37 Sup. Ct. Rep. 61; *Manufacturers R. Co. v. United States*, 246 U. S. 457, 482, 62 L. Ed. 831, 844, 38 Sup. Ct. Rep. 383. But Transportation Act 1920 repealed that provision in Section 3; it made provision for *securing* joint use of terminals; and it prohibited any acquisition of a railroad by carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company." (Italics ours.)

The same principle of law is recognized by Mr. Justice Sutherland in his dissenting opinion as appears on page 273, where he says:

"The decision of the court here proceeds upon the theory that the injury complained of is a *denial of equality of treatment* in the use of the terminals; but I do not understand this to be the gravamen of the bill. The complaint is of inequality of opportunity to get business—not of opportunity to use the terminals. Complainants' access to the use and enjoyment of the terminal facilities acquired by the New York Central remains the same in respect of any business they may obtain. Interstate Commerce Act, Section 3 (3), (4), as amended by Transportation Act 1920, Chap. 91, 41 Stat. at L. 479, Comp. Stat. Sec. 8565, Fed. Stat. Anno. Supp. 1920, page 100. The Commission granted the authorization only upon condition that the neutrality of the terminals in their handling of traffic should be preserved. If their use be lessened, therefore, it will not be because access to the terminals has been, or is in danger of being, restricted, but because, with less business, there will be less occasion to use them." (Italics ours.)

In *Pennsylvania Company v. United States*, 236 U. S. 351 at page 363, the court says:

"It follows that the provisions of Section 3 of the act must be read in connection with the amendments and subsequent provisions, which show that transportation as used in the act covers the entire carriage and services in connection with the receipt and delivery of property transported. There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic, it was subject to the provisions of the act, and it was obliged as a common carrier in that capacity to afford all reasonable, proper, and equal facilities for the interchange of traffic with connecting lines, and for the receiving, forwarding, and delivering of property to and from its own lines and such connecting lines, and was *obliged not to discriminate in rates and charges* between such connecting lines. By the amendments to

the act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated." (Italics ours.)

In *United States v. Terminals Railroad Association of St. Louis*, 224 U. S. 383, wherein the Supreme Court prior to the enactment of the Transportation Act of 1920 had before it the question of a monopoly and the illegal restraint of terminal facilities contrary to the Sherman Act, the court in ordering a dissolution of the monopoly and combination said (page 411):

"Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, *place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.*" (Italics ours.)

Section 502 of the General Code of Ohio provides:

"*Application of act.*—This chapter shall apply to the transportation of passengers and property between points within this state, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, inci-

dent to the shipping and receiving of freight, which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes."

Section 504 of the General Code of Ohio provides:

"*Railroad required to furnish adequate service and facilities.*—Each railroad shall furnish reasonably adequate service and facilities. The charges made for any service rendered or to be rendered in the transportation of passengers or property, or for any service in connection therewith, or for the receiving, switching, delivering, storing or handling of such property, shall be reasonable and just. Every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 505 of the General Code of Ohio provides:

"*Railroad required to file schedules with commission.*—Each railroad shall print in plain type and file with the commission, within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, fares and charges for transportation of passengers and property, and any service in connection therewith, which such railroad has established and which are in force at such time between all points in this state upon its line, or any line controlled or operated by it."

Section 510 of the General Code of Ohio provides:

"*Charges shall conform to schedule.*—No railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as being then in force. The rates, fares and charges named therein shall be the lawful rates, fares and charges until they are changed as provided in this chapter."

It is therefore respectfully submitted that Terminals, under the Interstate Commerce Act and/or the statutes of the State of Ohio, must file tariffs and schedules of its rates with the Commission and/or the Public Utilities Commission of Ohio; that it can exact no other rate, fare or charge than that specified in its tariffs or schedules; that it can not make preferential contracts and cannot grant rebates. It is further respectfully submitted that the District Court and the Interstate Commerce Commission erred in failing to so find.

POINT II.—PARAGRAPH 4 OF SECTION 3 OF TITLE 49, U. S. C. IS NOT APPLICABLE.

While the Commission in its report (R. 51) did not expressly say so, yet in referring to Paragraph 4 of Section 3 of Title 49, U. S. C. and one of its previous reports in *Missouri Kansas Texas Ry. Co. v. K. C. T. Ry. Co.*, 104 I. C. C. 203, the only possible inference is that the Commission concluded that by reason of Paragraph 4 of Section 3 of Title 49, U. S. C. it was without jurisdiction to change the rental specified in the user contract here in question and that there was therefore no possibility of attack upon the terms of the same. The District Court with respect to Paragraph 4 of Section 3 of Title 49, U. S. C. said (R. 493):

> "We are of the opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration *the financial condition* of the contracting parties, *the ability to pay*, the use required and all other surrounding circumstances." (Italics ours.)

Paragraph 4 of Section 3 of Title 49, U. S. C. provides as follows:

"If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

It is very apparent that the terminal facility referred to in this section means a terminal constructed by one or more carriers for its or their own use and for the use of no other carrier. If such a terminal is constructed by one or more carriers and the facilities are such that another carrier, for whose use they were never constructed, could nevertheless use them without impairing the service rendered by the carrier or carriers which built them for their own use, then the Interstate Commerce Commission has authority to order the carrier or carriers

which built the terminal for their own use to permit another carrier to use it upon such terms as the carriers affected may agree, or if they cannot agree then upon such terms as the Commission might fix under the principles controlling compensation in condemnation cases. If the carrier or carriers ordered to grant the use of their terminal to another carrier are not satisfied with the compensation ordered by the Commission to be paid, they then have the right of appeal to the courts and this for the very obvious reason that in ordering a carrier to permit another carrier to use its terminal built for its own purposes, the Commission is confiscating private property, and unless the carrier affected had the right to appeal to the courts this section of the code would be unconstitutional. The very fact that appeal is given to the courts shows conclusively that the terminal facility referred to is one which was constructed for the private use of the carrier or carriers which built it, and that they did not profess to serve any and all other carriers who may choose to use it.

The situation is thus quite different from that which is presented in the case at bar. As we have seen, Terminals is building a depot, not for the exclusive use of any particular carrier or carriers, but one which, under its charter (Exhibit 68), is denominated a *common* or *union* station house and which, under the ordinance of the City of Cleveland (Exhibit 110) pursuant to which it is being built, must be open to every steam and electric railroad entering the City of Cleveland and desiring to use the same. Terminals, having thus professed to serve all who choose to employ it, has impressed its property with a public use, and does not stand in the same position as a railroad which builds a terminal for its own exclusive use.

Even though this were not true, yet the provisions of the code that the use therein referred to may be made "on such terms and for such compensation as the carriers

affected may agree upon" is no authorization to agree upon terms that are preferential and discriminatory. In construing any provision of an act it must be construed in view of each and all the other provisions thereof, and when so construed there is but one conclusion that can be reached and that is that the terms so agreed upon must be just and reasonable, non-preferential and non-discriminatory, for it is only such rates that railroads are permitted to charge in any event. This conclusion is strengthened by that provision of paragraph 4 of Section 3 to the effect that, if the carriers so affected cannot agree, then the Commission may prescribe the just and reasonable value of the use "on the principle controlling compensation in condemnation cases." Thus Congress clearly showed its intent that the use should be paid for by a rate that was just and reasonable, non-preferential and non-discriminatory. Again there is nothing in Paragraph 4 of Section 3 which takes away from the Commission its supervisory and regulatory powers over the rates and charges of carriers. The most that can be said is that Congress did not wish to labor the Commission with the determination of what is or what is not a just and reasonable rate until that question arose. Such, we all know, is the common practice. That such was the intent of Congress is shown by Paragraph 5 of Section 6 of Title 49, U. S. C., which provides:

> "*Copies of traffic contracts to be filed.* Every common carrier subject to this chapter shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party."

The purpose of this section is no doubt to advise the Commission and the public with respect to traffic arrangements between carriers and to prevent carriers as between themselves from granting preferential discriminatory rates

or practices. As this Court said in the *Chicago Junction* case, 264 U. S. 257, at page 267:

> "This loss is not the incident of more effective competition. Compare *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 148, *ante*, 215, 220, 44 Sup. Ct. Rep. 72. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, P. U. R. 1915 B, 261, 35 Sup. Ct. Rep. 370."

This language is particularly applicable to the case at bar, in view of the fact that Terminals has professed to serve all who apply. The relationship between Terminals and a carrier who seeks to use its facilities is identically the same as the relationship which exists between a carrier and a shipper. Such is not true of a carrier which builds a terminal for its own exclusive use. In the latter case only is paragraph 4 of Section 3 applicable. In the case at bar, there is no necessity for it, for, having professed to serve all, it is Terminals' legal duty to do so, a duty which is enforceable at common law without the aid of a statute.

It is therefore respectfully submitted that the District Court and the Interstate Commerce Commission erred in holding and finding that paragraph 4 of Section 3 of Title 49, U. S. C. is in any wise applicable to the case at bar.

The finding of the District Court that the *financial condition* of the contracting parties and their *ability to pay* are circumstances to be taken into consideration in determining whether or not the terms agreed upon are just and reasonable, is, it is submitted, without precedent in the law of common carriers. The validity of such finding is hereinafter discussed under point V.

POINT III.—THE USER CONTRACT.

A—Is Not in Accordance With Any Filed Tariff or Schedule.

From the testimony of Mr. Duncan and Mr. Durham, president and general manager of Wheeling, we learn that the rental of $20,000 per annum specified in the user contract was fixed by them as the most which Wheeling could afford to pay and that Terminals agreed thereto. (R. 245, 285) It consequently is not in accordance with any filed tariff or schedule such as every common carrier is required to file with the Interstate Commerce Commission under paragraph 7 of Section 6 of Title 49, U. S. C., and with the Public Utilities Commission of Ohio under Section 505 of the General Code of Ohio. The necessity of filing such tariffs and schedules has been discussed *supra* under Point I-C, pp. 46 to 53.

B—Is Preferential and Discriminatory.

Mr. Duncan, Chairman of the Board and President of Wheeling, and Mr. Durham, Vice President and General Manager of Wheeling, both testified that the rental of $20,000 per annum specified in the contract (R. Sec. 2; 124) was arrived at by ascertaining what Wheeling could afford to pay to Terminals without considering what it might cost Terminals to render the service called for. (R. 250, 251, 252, 290) That $20,000 per annum is all that Wheeling can afford to pay is admitted in Wheeling's answer. (R. 78) Mr. Duncan further testified that if Wheeling were to use Terminals' station upon the same basis that the proprietary lines (Central, Big Four and Nickel Plate) are to use it, Wheeling's proportion of capital expenditures would be about five per cent., which when reduced to dollars and cents and based upon a construction expenditure of $60,000,000, would mean an annual charge

to Wheeling of between $175,000 and $225,000 per annum (R. 277) and that in addition thereto Wheeling would have to pay its proportionate share of the cost of maintenance and operation. (R. 277) Now that the terminal is going to cost at least $88,000,000 (Paragraph 7, R. 210), Wheeling's proportionate share must be increased accordingly. From these figures and considering capital expenditures alone no one can say that the rental of $20,000 per year specified in the contract in question is anything other than preferential and discriminatory. And when we consider that Wheeling's gross passenger revenue from its present Cleveland station is but $82,000 a year, and that its gross passenger revenue from all sources is only $314,060.82 a year (R. 223, 224), we can understand why it is that Wheeling cannot afford to pay a non-preferential, non-discriminatory rate. As Mr. Duncan says, Wheeling "cannot afford to live in a palace." (R. 276)

That the contract here in question is discriminatory is further shown by the following provision thereof (R. 125):

> "The Wheeling Company's trains may also include cars from points of origin or to points of destination on extensions of or on lines connecting with the present lines of the Wheeling Company other than Pittsburgh and Connellsville and points westerly thereof as aforesaid, which cars handled into or through the Passenger Terminal shall be paid for upon the same per car basis from time to time as the cars handled into or through the Passenger Terminal for the account of the proprietary railroad companies of the Passenger Terminal."

In other words, if any one of Wheeling's connecting carriers, of which appellant is one, sends a car into the terminal via Wheeling, such connecting carrier must pay Terminals for the service so rendered a rate equivalent to that paid by the proprietary lines, which is greatly in

excess of that paid by Wheeling for the same service. The proprietary companies pay that proportion of Terminals' capital charges, to-wit, taxes, interest on bonded indebtedness and sinking fund requirements, and that proportion of the cost of maintenance and operation as the number of cars in its trains bears to the total number of cars in all trains in and out of the depot. (Exhibit 69, pp. 15, 18.) The cost of the electrification system is kept separately and each of the proprietary lines are to pay that proportion thereof which their use thereof bears to the total use thereof measured in either ton miles, car miles, engine miles or other agreed service unit. So that a connecting carrier sending a car into the terminal via Wheeling will have to pay many times as much as Wheeling pays, *and this for identically the same service.*

It might be argued that Wheeling is not to receive from Terminals the same service as the proprietary lines in that no coach yard service is to be furnished Wheeling while it is to be furnished the proprietary lines, and in that Wheeling's trains are to be hauled for a much shorter distance than those of the proprietary lines. In other words, the trains and cars of Central & Nickel Plate are to be hauled from East 40th Street, the easterly terminal limits, into the station and out to West 37th Street, the westerly terminal limits. Wheeling's trains are to be hauled from a point south of Eagle Avenue into the station and back out to Eagle Avenue. By reference to the testimony of Mr. Durham (R. 248) and Exhibit 31 we observe that the track thereon outlined in green is a track which must be constructed by Terminals for the purpose of making a connection with the track of Wheeling. Until such time as the track outlined in green is enclosed, Wheeling's locomotive will move on the green track to a point northerly of point Q where it will be disconnected from the train and backed into the siding. Terminals' electric locomotive

will then couple up to Wheeling's train at point Q and pull the train into the station. Upon the outward movement the electric locomotive will pull Wheeling's train to point R where it will disconnect and back into the siding and go back into the station, while Wheeling's steam locomotive hooks on to the train. The distance that an electric locomotive will consequently pull Wheeling's train into the station is 2,000 feet, while the distance out from the station to East 40th Street, the easterly terminal limits, is about two miles and the distance from the station out to West 37th Street is approximately another two miles.

Mr. Dambaugh, a practical operating man and General Superintendent of appellant, testified that based upon the testimony of Mr. Durham (R. 221, 222) to the effect that Wheeling operates seven trains a day into and out of Cleveland on week days, of an average content of 3.3 cars per train, and three trains on Sunday, while Central has a total of thirty-four in and out, Big Four fourteen in and out, and Nickel Plate seven in and out, a total of fifty-five (R. 242) with an average of seven cars to the train, the cost to Wheeling of using the terminal facilities, if it were to pay the same amount as the proprietary companies *after making an allowance for difference in electrified mileage* necessary to bring in Wheeling's trains as distinguished from the trains of the proprietary companies, would be (R. 312), $418,540.21 per year. (See Exhibit 102.) Later Mr. Schaff (R. 308) of the New York Central, testified on behalf of Terminals as to the number of trains and cars that Central, Big Four and Nickel Plate operated into and out of Cleveland on May 9, 1929, which he stated was an average day, and offered an exhibit (Exhibit 120) showing that these three proprietary lines operated into and out of the station 115 trains containing 1008 cars. Mr. Jouett testified on behalf of Terminals (R. 389 *et seq.*) that

Terminals in furnishing locomotives will furnish but a crew of two men.

Based upon this testimony of Mr. Schaff and Mr. Jouett, Mr. Dambaugh revised his figures and offered an exhibit (Exhibit 155) showing that the cost to Wheeling, if it were to pay the same as the proprietary lines, would, on a per car basis, be $128,740.44, and upon a per train basis $331,776.74, *after making due allowance for the difference in service to be rendered Wheeling.* The figures used by Mr. Dambaugh in reaching his conclusions set forth in Exhibits 102 and 155 are based not only upon his own experience as an operating man, but are based upon the experiences of the Washington Terminal at Washington, D. C., (R. 321 *et seq.*) after making proper allowance for the number of trains in and out of the Washington Terminal as compared with the number of trains in and out of the proposed depot of Terminals. This testimony of Mr. Dambaugh and his exhibits *are uncontradicted* despite the fact that both Wheeling and Terminals had an opportunity to show that Mr. Dambaugh's figures were incorrect. Terminals and Wheeling offered as a witness in this regard Mr. Jouett, Chief Engineer of Terminals, in charge of construction and who is not an operating man, who testified that the *out of pocket cost* to Terminals for services to be rendered to trains now being operated by Wheeling, to-wit, 2503, (R. 390, 391, 392) and which does not include Wheeling's 25 excursion trains, was $19,110.00 per year. His figures are as follows:

One ticket seller and one baggage porter..	$ 3,000.00
Heating Wheeling's cars	250.00
Locomotive power	490.00
Locomotive crews and Wheeling's proportion of locomotive maintenance and locomotive fixed charges	7,560.00

Interest, taxes and maintenance of additional construction (that outlined in green on Exhibit 31) required to bring Wheeling's trains into the station (the estimated cost of additional construction being $93,500)	7,810.00
Total	$19,110.00

When inquired of upon cross-examination, Mr. Jouett had no data to support his figures and admitted that they were prepared by others in his office. (R. 392)

It is hard to conceive how one baggage porter could handle Wheeling's 542 pieces of express shipments per day, both in and out, of an average aggregate weight of 26,382 pounds (R. 5), or how he could handle the baggage of Wheeling's passengers aggregating 95,000 per annum not including excursionists (R. 5), and handle Wheeling's 1212 tons of mail per year, to say nothing of the milk and empty milk cans which Wheeling transports in its baggage cars in and out of its station. Operating 2503 trains of an average of 3.3 cars per train there would be 688 cars per month operated in and out of the station, and it is hard to conceive how they could be heated for $250.00 per annum. What price per kilowatt-hour Mr. Jouett figured, or how many kilowatt-hours Terminals' locomotive would consume in hauling Wheeling's trains, Mr. Jouett could not tell us. Similarly he had no supporting data to substantiate his figure of $7560.00 per annum for Wheeling's proportion of locomotive crews, locomotive fixed charges and maintenance. His figure of $7810.00 for interest, taxes and maintenance of additional construction did not include a return upon the amount which Terminals will have to expend to purchase the lands necessary for the same. While Mr. McIntosh, the land and tax agent of Terminals, testified that the County Auditor for Cuya-

hoga County, Ohio, in which Cleveland is situated, values all property for taxation purposes at 100% of its value (R. 405), Mr. Jouett figured taxes on only 60% of $93,500.00. If another 1% were added for taxes this would increase by $935.00 the out-of-pocket cost, which would bring the same to $20,045.00 per annum. The cost of receiving and dispatching United States mail, railway mail, newspapers, company materials and supplies, the cost of furnishing space for the receipt, delivery and storage of express shipments and baggage, the furnishing of information by clerks, bulletin boards, notices and otherwise as to the arrival and departure of Wheeling's trains, the cost of a dispatcher and the cost of maintaining and operating signal towers and interlocking devices are omitted from Mr. Jouett's figures. Likewise did he omit wear and tear upon Terminals' tracks due to the operation of Wheeling's trains and wear and tear upon Terminals' station due to the use thereof by Wheeling's passengers aggregating 95,000 per annum, not including excursionists. (R. 394) Mr. Jouett further admitted that his out-of-pocket cost figured at $19,110.00 and based upon the number of trains regularly operated by Wheeling, to-wit, 2503, would have to be increased to take care of Wheeling's excursion trains and those additional trains which Wheeling under the contract is permitted to operate, to-wit 3000 trains of not more than 14,000 cars.

These figures clearly show that Terminals is to furnish Wheeling with service at a loss. This becomes all the more apparent when the rental is reduced to a per train or per car basis. On the basis of 2503 trains with 3.3 cars per train the rental of $20,000 is equivalent to $7.99 per train or $2.42 per car. On the basis of 3000 trains of not more than 14,000 cars, the rental on a per train basis is $6.66⅔ per train or $1.43 per car. The services to be rendered

under the user contract simply cannot be performed for that amount of money.

Moreover, it is submitted that the *out-of-pocket cost* is no criterion. Terminals is a common carrier and as such it must render service to all alike and not render service to Wheeling at a loss or at even out-of-pocket cost, while at the same time charging Central, Big Four and Nickel Plate a much higher rental. Terminals' depot will cost at least $88,000,000 (R. 210), a five per cent return on which (and 5% is conservatively low), is $4,400,000 per annum. Add 2.5% for taxes, the prevailing rate in Cuyahoga County, Ohio (R. 405), or $2,100,000, and we get a total of $6,500,000 per annum. Divide this sum by 51,975, being the annual number of trains of Central, Big Four and Nickel Plate at the rate of 115 trains per day, and by 367,920, being the annual number of cars at the rate of 1008 per day, and the cost per train is $125.00 and per car $17.66 for taxes and a 5% return on the money invested. Just how much more other capital and overhead charges and the cost of maintenance and operation will add is not disclosed by the record. It is certainly safe to assume that it will add an equal amount, making the total cost $250.00 per train or $35.32 per car for Central, Nickel Plate and Big Four as compared with Wheeling's cost of $7.99 or $6.66 per train and $2.42 or $1.43 per car. These figures conclusively prove that Mr. Dambaugh's figures, after making due allowance for differences in service, are conservatively low, for, based upon his Exhibit 155, his figures show that the rental of $20,000 per year is but one-sixteenth of what Wheeling should pay on a per train basis or one-sixth of what it should pay on a per car basis.

It is therefore respectfully submitted that the undisputed testimony in this case shows that the rental of $20,000 specified in the user contract is unjustly preferential and discriminatory. The observations of the Commis-

sion found in its report concerning this feature of the case are discussed under Point IV *infra*. The observations of the District Court upon this question are discussed under Point V *infra*.

Wheeling and Terminals no doubt will claim that because of the fact that Central, Nickel Plate and Big Four have a longer haul than Wheeling, Central, Nickel Plate and Big Four should pay more for the use of Terminals' facilities than Wheeling. Such an argument, however, begs the question, for it makes no difference in the cost to Terminals, *which is the criterion*, where the passenger train or cars originate or where they are destined to go. The cost to Terminals of servicing a train, of hauling it in and out of its depot and over the easterly and westerly approach, or any part thereof, is just as much whether the train comes from Los Angeles and Chicago and is destined to go to Boston or New York, as it would be if the train came from East Cleveland and was destined to go to West Cleveland. Moreover, as has been pointed out above, the user contract in question (R. 125) provides that if any connecting carrier of Wheeling sends a car into Terminals' depot over the lines of Wheeling, such connecting carrier shall pay the same amount per car as is paid by Central, Big Four and Nickel Plate, and this, if the Court please, for identically the same service that Wheeling receives. In other words, such connecting carrier, under the figures given above, would pay $35.32 for the service which it receives at the hands of Terminals while Wheeling pays but $2.42 or $1.43 per car for identically the same service.

C—Provides for a Rebate.

Section 1 of Article III of the user contract provides (R. 127):

> "If for any reason the facilities and/or service furnished to the Wheeling Company by the Terminals Company shall be claimed by the Wheeling Company to be unsatisfactory or inadequate, and the parties are unable to come to an agreement in that regard, the question as to whether the facilities and/or service so furnished are unsatisfactory or inadequate shall be submitted to arbitration as hereinafter provided. In the event the Board of Arbitration shall determine that the facilities and/or service so furnished are unsatisfactory or inadequate, it shall prescribe satisfactory and adequate facilities and/or service, which shall be furnished by the Terminals Company thereafter. Should the Wheeling Company nevertheless consider such facilities and/or service so to be provided to be unsatisfactory or inadequate, it shall have the option to require the Terminals Company, upon sixty (60) days' written notice, to pay to the Wheeling Company as liquidated damages the cost of constructing (exclusive of the cost or value of land) upon the property of the Wheeling Company, at a site to be chosen by the Wheeling Company, a Passenger Station which shall be adequate to the needs of the Wheeling Company (said cost not to exceed $200,000), and upon the completion of said Passenger Station both parties shall be relieved of any further obligations hereunder. In the event of the failure of the parties to agree upon the extent of the facilities necessary to provide a station adequate to the needs of the Wheeling Company, and/or the cost thereof, such question or questions shall be determined by arbitration as hereinafter provided."

The only possible construction that can be placed upon this provision is that it is a *rebate* or *drawback*, for if Wheeling, for the reasons set forth therein should with-

draw from the union depot then Wheeling *draws back* and Terminals *rebates* to Wheeling $200,000. Such rebates, drawbacks and similar devices are prohibited by Section 2 of Title 49, U. S. C., and Section 614-14 of the General Code of Ohio, both of which statutes provide as follows:

Section 2 of Title 49, U. S. C.:

"*Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 614-14 of the General Code of Ohio:

"*Rebates, special rates, free service, etc., prohibited.*—No public utility shall directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person, firm, or corporation, a greater or less compensation for any services rendered, or to be rendered, except as provided in this act, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under the same, or substantially the same circumstances and conditions. Nor shall free service or service for less than actual cost be furnished for the purpose of destroying competition, and such free service and every such charge is prohibited and declared unlawful."

POINT IV—THE REPORT AND FINDINGS OF THE COMMISSION RE POINTS I, II, AND III HEREOF ARE

A—Without Warrant in Law and Contrary to Law.

Every member of the Commission expressly found that the contract here in question was preferential. Thus the seven members concurring in the majority opinion said (R. 51):

> "It is clearly apparent that the contract is favorable to the applicant * * *."

Chairman Lewis of the Commission in his concurring opinion said (R. 54):

> "My only diversion from the decision of the majority rests in the fact that the *future* of the Wheeling and Lake Erie and *its ability to serve* the convenience of the city of Cleveland *are not*, it seems to me, *sufficiently safeguarded*. The Act empowers us to attach conditions to authorizations and we do on occasion require provisions as a condition precedent. It is my thought that we should have required a reconstruction of the contract between the carrier and the Terminals Company.
>
> "Doubts already have been expressed as to whether this contract, which gives to the carrier a *preferential* price or *rate for service* as against proprietary and other carriers, would stand up against attack. These contingencies may never materialize, but we had the opportunity to greatly strengthen the position of the carrier and also safeguard the convenience of the city of Cleveland. The opportunity should not have been brushed aside without an effort to bring into the contract some obvious facts.
>
> "I am fully aware of the testimony of the president of the carrier to the effect that the $1,600,000 sale price set on its property was a fair and reasonable price determined by himself and the carrier's executive committee and that this was quite apart from the $20,000 service contract; and that the $20,000 was all

the Wheeling and Lake Erie could pay for the service. This does not change one iota the obvious. Does any one imagine for a moment that the Terminals Company and the Terminals Building Company were moved by the financial limitations of the Wheeling and Lake Erie to such an extent that they gave it *such a preferential contract?* I do not observe such charity operating in this practical world in which these companies are proceeding. There is in my mind no doubt that, so far as those with whom the carrier dealt, the $1,600,000 paid by the Cleveland Terminals Building Company, *a non-carrier corporation,* and the $20,000 service contract made by the Terminals Company, tie in together; that jointly they are in consideration not only of the land conveyed and the carrier's giving up its opportunity to maintain a down-town station, but also are the result of the practical necessity of getting the Wheeling and Lake Erie out of the way of a successful and early working out of the terminal station plans. The carrier occupied a blocking location, intensified by new conditions created by the city of Cleveland building the Eagle Avenue viaduct. This dictated the two deals. I think that a strong suggestion or even a requirement that this be stated in the service contract would have been acceded to. I do not doubt the intention or the purpose of those who are in control of the Terminals Company to carry out to the letter its service contract. *But the control of the Terminals Company will change.* Persons or interests for various reasons that may arise *may bring into issue the terms of the contract.* The position of the Wheeling and Lake Erie certainly would have been greatly strengthened by such an admission and inclusion of this consideration as a part of the contract. This certainly would have been so in proceedings before this Commission, *whose membership changes with considerable rapidity.*" (Italics ours.)

Commissioner McManamy in his concurring opinion said (R. 56):

"In fact one of the chief concerns of the interveners is that the *terms given* to Wheeling are *so favorable* that it may not be permitted to retain them. Certainly the Wheeling *should be protected* in the permanent enjoyment of the rights here granted and I believe that could have been readily accomplished by suitable provisions in the contract and that such provisions should have been included." (Italics ours.)

Commissioner Eastman in his dissenting opinion said (R. 59):

"Here the terms offered the Wheeling *admittedly give it a preference* over other users of the station, and if it should be treated on equal terms with other users, *the yearly payments would be far larger than those which are proposed and more than it can afford.* Clearly the Wheeling ought not to be subjected to this danger, nor ought we to give our approval to a *preferential contract* for the use of the station which would *violate* the *provisions of the interstate commerce act.*" (Italics ours.)

Certainly the suggestions made by Chairman Lewis and Commissioner McManamy to the effect that provisions should be inserted in the contract to show that the consideration of $1,600,000 to be paid Wheeling for its property was tied in with the $20,000 rental specified in the contract, would not change the situation one iota. Such a change would be *contrary* to the *express testimony* of Mr. Duncan who testified as follows (R. 291):

"The fact that the use of the terminal facilities was figured at $20,000 was not taken into consideration in arriving at the sale price of $1,600,000 for the property. I tried in the ultimate analysis to determine what was a fair and reasonable value for our property and in doing so I secured the advice and information to which I have referred in my earlier examination, and the directors, in the end, or the Executive Committee, to be more accurate, took the position that we

should say to Terminals that it was $1,600,000 and that we would not negotiate the matter on any other basis. In arriving at this figure of $1,600,000 we gave no consideration to the $20,000 rental specified in the user contract. That was as much as we could afford to pay and had nothing to do with obtaining the fair value of our land."

And it would not justify the granting to Wheeling of a preferential rate.

No one would assert that a railroad in buying land from a shipper could grant that shipper a preferential rate in consideration of a sale price which was less than the value of his land. The suggestions of Commissioner Lewis and Commissioner McManamy, however, go still farther. The effect of their observations is that Building, a privately owned company, is paying Wheeling less than the fair value of its lands because Terminals, a public corporation whose revenues are being derived from the travelling and shipping public, is giving Wheeling service, not only at an unjustly discriminatory and preferential rate, but at a rate which is less than the cost of rendering such service. In other words, the Van Sweringens, who control Building and who are under contract (Exhibit 49) to furnish Terminals with an easement across Wheeling's property for the sum of $1.00, are reaping a harvest at the expense of Terminals. Such a suggested holding or finding is without precedent. Wheeling should be paid by Building, a privately owned Company, the fair value of its property and Wheeling should pay a non-preferential, non-discriminatory rate for the service which it proposes to accept at the hands of Terminals. If it cannot do this, then it cannot use Terminals' facilities, and if it cannot use Terminals' facilities under the user contract it does not want to sell its property to Building. (R. 289, 290) No one ever heard of a shipper being permitted to use the facilities of a railroad at less than out-of-pocket cost or even for out-of-pocket cost or for any

other rate than that which will earn for the carrier a return upon the money invested. If the shipper cannot pay this rate he does not ship, and if, as this Court has said in the *Chicago Junction* case, *supra,* railroads bear the same relation to terminal companies as shippers bear to railroads, then if a railroad cannot afford to pay a non-discriminatory non-preferential rate for the use of terminal facilities it cannot use them.

Counsel therefore respectfully submits that the Commission's report and finding in this respect are wholly without warrant in law and contrary to law.

It will be observed that the Commission in its report failed to make any finding with respect to the issues presented, to-wit, that the user contract provides for a *rebate.* Though this question was argued to the Commission and briefed for them, the Commission absolutely ignored it. Such a position is likewise without warrant in law and contrary to law.

B—Arbitrary in That They Ignored the Testimony Offered.

No doubt due to the finding that they were without jurisdiction in the premises, the Commission made no finding concerning the rate specified in the contract and thus ignored the testimony offered relative thereto and hereinabove referred to under sub-heading B, Point III hereof, p. 58 *supra.* They contented themselves with a finding that the rate was preferential and that "evidence was submitted by the Terminals Company tending to show that the proposed rental *approximates* the out-of-pocket cost to it of furnishing facilities and service to the applicant." (R. 50) That counsel for the Terminals Company in their brief submitted to the Commission admitted that the Terminals Company will not make a profit under the contract and stated "but in view of all the circumstances,

and all of the considerations entering into the contract, we submit that it is reasonable and fair and under the same considerations it is made in the public interest," (R. 50) does not make legal that which is illegal. The Commission made no finding with respect to Section 1 of Article III of the contract which, as hereinabove stated, provides for a rebate.

It is therefore respectfully submitted that in ignoring the testimony of Mr. Jouett, which conclusively shows that Terminals under the contract in question will render its services to Wheeling at a loss, and in ignoring the testimony of this appellant, which undisputedly shows that Wheeling will pay but one-sixth if not one-sixteenth of what it is in law bound to pay, the Commission acted arbitrarily and contrary to the uncontradicted testimony.

POINT V—THE DISTRICT COURT ERRED IN FINDING AND HOLDING THAT THE USER CONTRACT AND THE OPTION TO SELL ARE WHOLLY INTERDEPENDENT AND MUST BE CONSIDERED AS ONE.

The District Court in its opinion said (R. 493, 494):

"The inhibition against discrimination requires only that equality of charge be made for contemporaneous service of the same or similar kind. Otherwise expressed, the act requires only that all shall be treated the same under the same or similar circumstances. In the present case it is not conceivable that any other carrier could possibly present the same or a similar situation to that occupied by Wheeling. The entire project of terminals is blocked by and dependent upon the matter of obtaining the Wheeling station site. The construction of the Eagle Avenue ramp effectively destroyed all practical possibility of constructing the terminal without obtaining Wheeling's property. The contracts for the purchase of this property and for granting terminal facilities to Wheeling are wholly in-

terdependent and the cash consideration to be paid Wheeling is predicated not alone upon the strict value of the property as such but rather upon its value in consideration of the substitution of another terminal. The two contracts must be considered as one and the consideration as single. Terminals must obtain the property, and considering the impossibility of condemning it or its acquisition otherwise than with the consent of Wheeling, the ability of Wheeling to pay, and other surrounding circumstances, a contract whereby Wheeling conveys the property for a cash consideration of $1,600,000 and an agreement for substituted terminal use at a rental of $20,000 per year for Wheeling's contemplated needs, instead of a much higher rental which could only be obtained as income from the surplus of a much higher cash consideration, appeals to the court as just and reasonable to both parties. No more satisfactory arrangement from either viewpoint, public interests considered, could be made."

In the first place, the court's finding that the contracts for the purchase of Wheeling's property and for granting terminal facilities to Wheeling are wholly interdependent and that the cash consideration to be paid Wheeling for its property is predicated not only upon the strict value of the property as such but rather upon its value in consideration of the substitution of another terminal is *contrary to the uncontradicted testimony.* The only effect which can be given to such a finding is that Wheeling accepted less than the true value of its property because it was to obtain terminal facilities at less than those terminal facilities were reasonably worth. Mr. Duncan, president of Wheeling, expressly testified (R. 291):

"The limit that Wheeling could pay, in my judgment, to get into the station is the amount that I have fixed, $20,000, and Wheeling could not afford to pay more than that for the service that is mentioned in the contract. The fact that the use of the terminal facilities

was figured at $20,000 *was not taken into consideration* in arriving at the sale price of $1,600,000 for the property. I tried in the ultimate analysis to determine what was a fair and reasonable value for our property and in doing so I secured the advice and information to which I have referred in my earlier examination, and the directors, in the end, or the Executive Committee, to be more accurate, took the position that we should say to Terminals that it was $1,600,000 and that we would not negotiate the matter on any other basis. *In arriving at this figure of $1,600,000 we gave no consideration to the* $20,000 rental specified in the user contract. *That was as much as we could afford to pay and had nothing to do with obtaining the fair value of our land.*" (Italics ours.)

Thus the finding of the court in this regard is contrary to the uncontradicted and only testimony upon that point. Moreover, inasmuch as the consideration for the property is to be paid by Building and not by Terminals, Building being a privately owned company and Terminals being a public transportation company, such a finding results in burdening transportation for the benefit of private interests. And this is particularly true when we bear in mind the fact that Building, under its contract with Terminals (Exhibit 49), in which it sold Terminals certain lands reserving air rights, is under obligation because of such reservation to deliver to Terminals the easterly approach and its right of way across Wheeling's property for the sum of $1.00. Again, and even though Terminals were to pay the consideration for the property, no precedent can be found which supports the conclusion of the court that a common carrier can grant to a shipper a preferential discriminatory rate in consideration of a sale by that shipper to the carrier of a piece of the shipper's property for less than its true value.

It is further obvious from the court's opinion that, in arriving at its conclusion that the terms under which

Wheeling proposes to use the facilities of Terminals are reasonable and just, it not only considered the user contract and the option to sell as one and the considerations therein expressed as single, but further took into consideration what it terms Wheeling's "strategic" or "blocking" position and "Wheeling's ability to pay." Again, it is submitted that no precedent can be found for any such holding. Rates are not made in accordance with one's ability to pay, for if that were the situation we would have one rate for the poor and one for the rich. Rates are based upon the cost of rendering service plus the cost of returning to the carrier a fair return upon its money invested. Wheeling's strategic or blocking position is of no consequence. Terminals and Van Sweringens knew Wheeling's position before they ever put a spade in the ground or started to build their depot. Yet they started to build in the face of Wheeling's protest, and are now attempting to pull themselves up by their own boot straps. As this Court said in the recent case of *Chicago & Northwestern Railway Company v. O. N. Lindell,* (October Term 1929, No. 193, decided February 24, 1930):

> "The purpose of the Act to prevent discrimination has been emphasized by this court and is well-known. Since its enactment carriers may not accept services, advertising, property or a release of claim for damages in payment for transportation. They are required to collect the established rates, charges and fares from all alike in cash. *Louisville & Nashville R. R. v. Mottley,* 219 U. S. 467; *Chi., Inc. & L. Ry. Co. v. United States,* 219 U. S. 486; *Lake & Export Coal Corp. v. Chesapeake & Ohio Ry. Co.,* 1 F. (2d) 968; *State v. Union Pacific R. R. Co.,* 87 Nebr. 29."

In the case of *Union Pac. R. Co. v. Goodridge* (1892), 149 U. S. 680, in which was involved the construction of a statute of the State of Colorado forbidding discrimination in rates and the granting of rebates, and

which statute embodied provisions similar to the Interstate Commerce Act, the court held that it was no answer to a charge of discrimination by the railroad company in allowing less rates than other shippers were required to pay, that the railroad had received from the shipper in whose favor the reduced rate was given, other consideration in the form of a compromise of an unliquidated claim against the railroad company. The opinion states, p. 691:

> "There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else were interested in the transaction, that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory, if this rule were given full effect. For this reason we think the railroad company is in error in its assumption that 'if, in the honest judgment of the officers of the defendant company, who made the contract, the considerations which entered into it, and upon which alone it was made, were sufficient to warrant the company to pay back to the Marshall Company forty cents per ton for each ton it shipped for five years, that is enough.' This is but a restatement in different language of a comment made by the court below in its opinion, that 'the whole answer amounts only to this: That the Marshall Company is allowed less rates than others shippers are required to pay upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination.' If reasons of public policy dictate that the schedule rates shall be posted conspicuously in each railway station, it is no less important that the customers of the road shall have the means of ascertaining whether any departure from such rates in favor of a particular shipper is justified by the facts."

In the case of *United States v. Union Stock Yards & T. Co.* (1912), 226 U. S. 286, it was held that an unlawful discrimination, forbidden by the Interstate Commerce Act, is accorded by a contract between a packing house firm and a stock yard company operating, through its lessee, a railway system carrying on interstate commerce, by which such company agreed to pay a bonus of $50,000 to the packers, provided they would erect their new plant in Chicago adjacent to the stock yard, instead of in Kansas City, as was proposed, and would maintain and operate the plant for fifteen years under certain stated conditions. Mr. Justice Day, in the court's opinion, said, p. 307:

> "By Sec. 2 of the act to regulate commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins act makes it an offense for any person or corporation to give or receive any rebate, concession, or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff, or whereby any other advantage is given or discrimination is practised. By the very terms of the contract it is evident that the interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfaelzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive $50,000, and it obligates them to maintain and operate the plant for a period of fifteen years, and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so bought, to pay the regular charges thereon as if the

same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of $50,000, with the bonus given to the Pfaelzers for the location of their plant in juxtaposition to the stock yards. The only interest which the Stock Yard Company has in Pfaelzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Company in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered, without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus, there has been an undue advantage given to and an unlawful discrimination practised in favor of Pfaelzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins act as to departures from published rates,—and we must consider the case in that light,—and this preferential treatment, as we have said, would have been in violation of that act. *It is the object of the interstate commerce law and the Elkins act to prevent favoritism by any means or device whatsoever,* and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the commerce court should have enjoined the carrying out of this contract." (Italics ours.)

See also *Fourche River Lumber Company v. Bryant Lumber Company,* 230 U. S. 316; *Cleveland R. R. Co. v. Hirsch,* 20 Fed. 849; *Vandalia R. R. Co. v. United States,* 226 Fed. 716; *Hocking Valley R. R. Co. v. United States,* 210 Fed. 741.

It is therefore respectfully submitted that the District Court erred in finding and holding that the user contract

and the option to sell must be considered as one and the considerations therein expressed as single for the reason that such a finding is not only directly opposed to the uncontradicted testimony but for the further reason that it is contrary to law.

It is further submitted that the District Court erred in finding and holding that Wheeling's ability to pay and its alleged strategic or blocking position were circumstances to be taken into consideration in determining whether or not the rate of $20,000 per annum specified in the user contract is unjustly discriminatory and preferential.

In its opinion the District Court made no reference to and did not pass upon the claim of the appellant, although the question was argued to the court both orally and on brief, that Section 1, Article 3 of the user contract (R. 127) provides for a rebate. That it does provide for a rebate has been pointed out *supra* under Point III-C, p. 67.

POINT VI—THE RENTAL SPECIFIED IN THE USER CONTRACT IS SUBJECT TO CHANGE.

In its report and findings the Commission stated:

> "It is clearly apparent that the contract is favorable to the applicant, yet the protestant, as a minority stockholder of applicant, appears in the unusual position of objecting to that contract on the ground that it is favorable."

Upon its face it is an extremely favorable contract. But when carefully analyzed, it, together with the option to sell Wheeling's property, deprives Wheeling of the best located passenger station site in the City of Cleveland and imposes upon Wheeling for a period of five years at least a burden which Wheeling admits it cannot afford to carry.

We have seen that Terminals is a common carrier subject to the Interstate Commerce Act and/or the public

utility laws of Ohio. As such Terminals cannot charge discriminating rates and cannot grant rebates. We have likewise seen that the rate specified in the contract unjustly discriminates in Wheeling's favor and provides for a rebate. Furthermore, Section 6 of Article III of the Contract (R. 130) and Section 9 of Article VII of the Union Passenger Terminal Agreement (Exhibit 69, p. 33) both provide:

> "This agreement is made subject to all existing and future federal or state laws, and to all rules or orders made by any board, commission or body having competent authority to regulate any of the parties hereto, and to the approval and authorization of the Interstate Commerce Commission (if required by law). *In case it should be found to conflict with any such law, rule or order it shall be modified to conform thereto.*" (Italics ours)

Even though this provision was not found in the contract we know that by reason of the Interstate Commerce Act and the public utility laws of Ohio and the police powers of both the federal government and the State of Ohio, such is the law.

Moreover, the federal statutes insofar as they are here applicable provide:

Section 12 of Title 49 U. S. C.:

> "*Authority, duties, and proceedings of commission; witnesses.* The commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required to execute and enforce the provisions of this chapter; * * *."

Section 13 of Title 49 U. S. C.:

"*Complaints to and investigations by commission.*—(1) *Complaint to commission of violation of law by carrier; reparation; investigation.* Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. * * *

"(2) *Complaint by State commission; inquiry on commission's own motion.* Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. * * *

"(4) *Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, *finds that any such rate, fare, charge,* classification, regulation, or practice *causes any undue or unreasonable advantage, preference, or prejudice* as between persons or localities in intrastate commerce on the one hand

and interstate or foreign commerce on the other hand, or any *undue, unreasonable, or unjust discrimination against interstate* or foreign commerce, which is forbidden and declared to be unlawful *it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged,* and the classification, regulation, or practice *thereafter to be observed,* in such manner as, in its judgment, *will remove such advantage, preference, prejudice, or discrimination.* Such rates, fares, charges, classifications, regulations and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." (Italics ours.)

Sections 524, 525, 527 and 528 of the General Code of Ohio provide:

Section 524: "*Complaints and hearings.*—Upon complaint of a person, firm, corporation or association, or of a mercantile, agricultural or manufacturing society, or of a body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice, affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission may notify the railroad complained of that complaint has been made, and ten days after such notice proceed to investigate such charges as provided in this chapter. * * *"

Section 525. "*Railroad may be complainant.*—The next preceding section shall be construed to permit a railroad to make complaint with like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization."

Section 527. *"Commission may change unreasonable rate.*—Upon an investigation, if the rate or rates, or any regulation, practice or service complained of is found to be unreasonable or unjustly discriminatory, or the service inadequate, the commission may fix and order substituted therefor, such rate or rates, fares, charges or classification as it shall have determined to be just and reasonable, which shall be charged, imposed and followed in the future. It also may make such orders respecting such regulation, practice or service as it shall have determined to be reasonable, which shall be observed and followed in the future, but no rates fixed shall exceed the maximum rates prescribed by any statute of this state in force at the time the commission fixes such rates."

Section 528. *"Commission may investigate upon its own motion.*—If the commission believes that any rate or rates, or charge or charges, may be unreasonable or unjustly discriminatory, and that an investigation relating thereto should be made, it may investigate them upon its own motion. Before such investigation it shall present to the railroad a statement in writing setting forth the rate or charge to be investigated. Thereafter, on ten days' notice to the railroad of the time and place of such investigation, the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto, as if such investigation had been made upon complaint."

Under these provisions of our statutes and upon investigation by the Interstate Commerce Commission and/or the Public Utilities Commission of Ohio, either upon their own motion or upon complaint by any person, the rate specified in the contract can be greatly increased and the provisions thereof granting Wheeling a rebate can be declared unlawful and because of Section 6, Article III of the contract (R. 130) the same can be modified accordingly. Thus if Wheeling is permitted to do that which it proposes to do

and which the Commission has authorized it to do, it will sell its Ontario Street Passenger Station Site, and will use the facilities of Terminals, and after its passenger station site is gone beyond recall, someone, perhaps another railroad seeking to use Terminal's facilities upon the same basis as that now specified in Wheeling's user contract, will raise the question of the illegality of the rate therein specified. Then Wheeling with its user contract modified will be burdened with a rate of at least $128,000 per year (Exhibit 155 on a per car basis), a burden which it cannot afford to carry, and will be unable to withdraw from the station for a period of five years under the provisions of Section 4 of Article III thereof (R. 129.) And even though it could withdraw, it will not be able to regain its present conveniently located passenger station site or any other site which is so centrally located as its present one. Such a situation is indeed gratifying to Central, B. & O. and Nickel Plate, Wheeling's competitors.

The District Court in its opinion (R. 491) said:

> "An option is afforded Wheeling, if at any time dissatisfied with the service, to withdraw from the terminal and to receive $200,000 with which to construct a station elsewhere. However, this would manifestly compel the construction of such station in the bottoms and much farther and more inaccessibly located from the center of the city than the location either of the present Wheeling station or of the union depot. To so deprive the company of central access to the city and of advantageous location of its terminal, at the only alternative of paying a ruinous rental for terminal facilities in the union depot, could not possibly be conducive to public interest or necessity so far as Wheeling, its territory, its services or its public is concerned."

It is therefore respectfully submitted that the District Court and the Interstate Commerce Commission erred in

failing to find and hold that the rental of $20,000 per annum specified in the user contract was subject to change and that as such it was not in the public interest for Wheeling to abandon its favorably located passenger station site and operate into the union depot of Terminals.

POINT VII-A—THE ACTION PROPOSED TO BE TAKEN BY WHEELING IS CONTRARY TO THE CLAYTON ACT.

Section 18 of Title 15, U. S. C. provides:

"*Acquisition by one corporation of stock of another.* No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

Section 21 of Title 15 U. S. C. provides:

"*Enforcement provisions; procedure.* Authority to enforce compliance with sections 13, 14, 18, and 19 of this chapter by the persons respectively subject thereto is vested: in the Interstate Commerce Commission where applicable to common carriers. * * *.

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of said sections, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its

findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this chapter, if any there be, in the manner and within the time fixed by said order. * * *"

In the fall of 1926 and the spring of 1927, B. & O., Central and Nickel Plate, without the consent of this Commission and acting in concert, purchased approximately 53% of the capital stock of Wheeling and had the same transferred to their names upon the books of the company in time to vote the same at the May 25, 1927, annual meeting of stockholders, at which directors were to be elected. (Exhibit 87.) The Commission on May 17, 1928, filed Clayton Acts complaints against B. & O., Central and Nickel Plate (Exhibits 94, 95, 96) and has since determined that the acquisition of such stock was illegal and in violation of the Clayton Act, inasmuch as the effect thereof may be to substantially lessen competition. (Exhibit 97, 152 I. C. C. 721.) It is submitted that the only way in which the effect of the acquisition of the capital stock of Wheeling may be or could be to substantially lessen competition would be to use such stock for the purpose of electing directors and thereby securing control of the company. And this is just exactly what B. & O., Central and Nickel Plate did. At the May 25, 1927, stockholders' meeting, the three trunk lines claimed that the directors of Wheeling had not theretofore been properly classified and they offered a resolution reciting that it was to the best interest of the company that the directors be properly classified and reciting further the proper classification thereof. (See Exhibit 88.) This resolution was unanimously adopted and it must be noted that all of the men who theretofore had been directors of Wheeling, all of whom were present at this meeting either

in person or by proxy (Exhibit 89), voted in favor of such resolution. Thereby their offices as directors immediately became vacated, because until their offices were vacated, there were not fifteen vacancies on the Board to be filled. It is important that we bear this fact in mind because of an argument which Wheeling will, no doubt, put forward, to the effect that if its present directors were illegally elected either in May, 1927, or May, 1928, yet inasmuch as they were directors prior to 1927 they are still directors as "holdovers." The "holdovers" having voted in favor of the resolution which declared their own offices vacant cannot, by any possible stretch of the imagination, be considered "holdovers." After passing this resolution, the three trunk lines then insisted upon the right to vote their prior lien stock as a class and to elect thereby a majority of the directors to be elected at the meeting. (Exhibit 88) This right was insisted upon because the articles of incorporation (Exhibit 51) grant the same to the prior lien stockholders whenever the company shall have failed to pay dividends for five consecutive years upon the prior lien stock, and no dividends had ever been paid upon the prior lien stock prior to May, 1927. Although the right of the prior lien stockholders to elect a majority of the Board had never theretofore been exercised, yet Central, B. & O. and Nickel Plate were granted such right and they thereupon, by means of their illegally acquired stock and over the protest of appellant and other shareholders representing in all a majority of the preferred and common shares, elected eight out of the fifteen directors. Similarly, by means of their illegally acquired prior lien, preferred and common stock, they again, over the protest of appellant and other shareholders representing in all a majority of the preferred and common shares, elected four out of the remaining seven directors to be elected at the meeting, appellant and other shareholders representing in all a

majority of the preferred and common shares, electing three directors out of the fifteen. The offices of five of the directors so elected expired in May of 1928, and at the annual stockholders' meeting held on the 23rd day of May, 1928, (Exhibit 91) Central, Big Four and Nickel Plate, notwithstanding the Clayton Act citations filed against them on May 17, 1928 (Exhibits 94, 95 and 96), again insisted upon the right as prior lien stockholders to elect a majority of the directors to be elected at the meeting and, over the protest of appellant and by means of their illegally acquired prior lien stock, they elected three directors. (Exhibit 91.) By means of their illegally acquired prior lien, preferred and common stock, they elected one of the remaining two directors to be elected at the meeting, complainant and other stockholders, representing a majority of the outstanding preferred and common stock, electing the remaining fifth director.

The corporate action taken by Wheeling and for which it sought the approval of the Commission herein complained of was authorized, over the protest of the three directors elected by appellant and other stockholders, by the twelve directors elected by the illegally acquired stock of Central, B. & O. and Nickel Plate. The contract which they have authorized and their officers have executed for the use of Terminals' facilities is, as we have seen, a discriminatory rebating contract. It is "dressed up" so as to appear to be an exceptionally favorable contract to Wheeling. When carefully scrutinized and analyzed it is diabolical in its terms and is beyond question designed for the purpose of depriving Wheeling, a competitor of Central, B. & O. and Nickel Plate, of a very valuable passenger station site and of imposing upon Wheeling a burden which Wheeling cannot afford to carry, but which it cannot escape if it is permitted to do that which it seeks to do, and which can mean nothing but receivership in the long run.

That it is the duty of Terminals to furnish its facilities to all carriers upon the same terms has been discussed *supra*. Any stockholder of Central, which owns 93% of the stock of Terminals and has guaranteed its $88,000,000 worth of obligations, is vitally interested in seeing to it that Terminals performs its legal duty and exacts full pay for services rendered by it. The same is true of any stockholder of Nickel Plate which owns 7% of the stock of Terminals and which has guaranteed its $88,000,000 worth of obligations. They could force the filing of tariffs and non-discriminatory rates and could force Wheeling to pay the same. Consequently, it is no longer a question as to what the effect of the illegal acquisition of Wheeling stock may be; it is bound to be ruinous under the contract in question, authorized by directors elected by means thereof. That the Commission had jurisdiction to withhold its approval of the contract in question because it was authorized by directors elected to office by stock illegally acquired in violation of the Clayton Act is well shown by the case of *Federal Trade Commission v. The Western Meat Co.* and the other cases considered therewith, reported in 272 U. S. 554, wherein the court held that, while the Commission had no jurisdiction to set aside those things which were done pursuant to illegal stock control *prior* to the time that Clayton Act complaints were issued, the Commission did have jurisdiction to set aside anything that was done by means of the illegal stock control *after* the Clayton Act complaints were issued. In the second syllabus, the court said:

> "2. The Federal Trade Commission in ordering a corporation to divest itself of the stock of a competitor acquired in violation of the Clayton Act, may, where the property has not been actually acquired, but the intention is to obtain control of it and dissolve the corporation, include a direction that the divestment

shall include the competitor's plant and all property necessary to the conduct and operation thereof."

These authorities establish beyond question that the Commission had jurisdiction to withhold its approval from that which Wheeling sought to do. That it is the result of the illegal acquisition of Wheeling's stock by Central, B. & O. and Nickel Plate and one of the very things at which Section 7 of the Clayton Act was directed, could not be established in any clearer fashion than it is established in this case by the testimony of Mr. Duncan, President and Chairman of the Board of Wheeling. Despite what Manager Hopkins might say as to Wheeling's being agreeable to the Eagle Avenue ramp ordinance, (R. 397) the fact remains that as late as the fall of 1926 the City of Cleveland was threatening to take some action against Wheeling in order to get the Eagle Avenue ramp completed, and Mr. Duncan's reply to the City Manager at that time was:

> "I explained the situation to Mr. Hopkins. He said that it was unfortunate but there was not anything left for the City to do but to take whatever steps might be necessary to have that ramp completed and he was insisting that it be completed at as early a date as could be. We did not do anything in the matter—that was in 1926—that is, with the City. My recollection is that the construction of the ramp had started. I am not certain about that. In 1927 we were undertaking to learn how the property should be divided. In the fall of 1927, if my dates are correct, the City Solicitor told me that he had received instructions to take such steps as might be necessary so as not to delay the completion of the Eagle ramp, and that meant that the railroad must either reduce its grade voluntarily or that the City would take such action as was necessary. I discussed the matter with all the officials of the company and we reached the conclusion that it was not wise for us to continue to play what was not intended to be but what might be characterized

as a hold-up on our part of the City, we have so many interests in the City, shippers, we have relations of all kinds and this terminals project, *no matter what the opinion may have been in the earlier stages,* had become a fixed idea in the City of Cleveland." (R. 284.)

We may honestly inquire as to why this change of attitude between 1926 and 1927, and the only reason that can be assigned therefor is the fact that stock control of Wheeling changed from the Rockefellers to Central and Nickel Plate, Central with its 93% interest in Terminals and Nickel Plate with the remaining 7%. Having used their illegally acquired stock for the very purpose of bringing about that for which they sought the approval of the Commission, it is respectfully submitted that such approval should have been withheld.

The Commission dismissed the contention of complainant that the action proposed was in violation of the Clayton Act with the following statement (Bill of Complaint p. 63):

> "It is clear that before a carrier can be held to have violated the provisions of this law there must be a finding of the fact that the acquisition by it of stock of another carrier may be to substantially lessen competition, etc. Such a finding of fact was made by us on March 11, 1929, subsequent to the commencement of the present proceedings, and we neither made that finding retroactive nor did we find that the acts of the directors elected by the stock owned by the three trunk lines should be nullified. Under the circumstances we are of the opinion that the contentions of the protestant in this respect are without merit. In view of this finding it will be unnecessary to discuss the remaining points raised by the applicant."

Such conclusion is clearly contrary to law for, in the complaints filed against B. & O., Central and Nickel Plate (Exhibits 94, 95 and 96), the Commission charges them

with violating the Clayton Act in acquiring Wheeling stock in the *spring of 1927*. That was the issue to be tried out and it was tried out, and the Commission found on March 11, 1929, "that such acquisitions were therefore in violation of Section 7 of said Act." Of course the Commission did not find that the acts of directors elected by such stock should be nullified. It could not nullify all acts, but under the doctrine of *Federal Trade Commission v. The Western Meat Co.*, 272 U. S. 554, the Commission has jurisdiction to nullify the acts of directors performed or intended to be performed after the filing of Clayton Act complaints where the effect of such acts may be to substantially lessen competition. The hearing in the Clayton Act case was in June of 1928, prior to the time that any of the actions herein complained of took place. That the effect of such acts may be to substantially lessen competition cannot be doubted. It will result in depriving Wheeling of the best located passenger station in the City of Cleveland for the benefit of Wheeling's competitors, and will impose a burden upon Wheeling which it admittedly cannot afford to carry. The same directors who now seek to belittle Wheeling's passenger station site said in a protest filed with the Commission in 1921 in the *Cleveland Passenger Terminal* case (Exhibit 82 p. 2):

> "Such passenger station is more centrally located with reference to the retail business, the financial, hotel and theater districts, than the passenger station of any other carrier entering Cleveland, and such passenger facilities admit of development to meet the reasonable future requirements of the intervener. Such facilities are adequate and constitute an integral part of the railroad of this intervener, without which it will be impossible for it to discharge its duties as a common carrier."

What was true then is true now except for the fact that stock control of Wheeling has changed from the Rockefeller interests to Central, B. & O. and Nickel Plate.

If the Commission did not have jurisdiction to nullify the acts of directors, performed or intended to be performed after the filing of Clayton Act complaints, where the effect of such acts may be to substantially lessen competition, its jurisdiction would amount to nothing. Of what avail is it if, as in the case at bar, the Commission can merely order a divestiture of the stock illegally acquired and cannot set aside acts done or intended to be done, the effect of which will be to substantially lessen competition?

It is therefore respectfully submitted that the Commission erred in finding and holding that its Clayton Act decision was not as of the date Central, B. & O. and Nickel Plate acquired their Wheeling stock, and that it further erred in finding and holding that it was without jurisdiction to set aside the acts herein complained of and that there was no merit in appellant's contention.

The District Court failed to pass upon this question although the same was argued to it both orally and on brief, and it is consequently submitted that the District Court erred in failing to find and hold that the Commission did have jurisdiction to refuse to issue its certificates of public convenience and necessity to Wheeling because the acts which Wheeling proposes to do in furtherance thereof are acts which were authorized by directors elected to office by the illegally acquired stock of Central, B. & O. and Nickel Plate, and are acts which were authorized after the filing of Clayton Act complaints by the Commission and which, if carried out, deprive Wheeling of a favorably located passenger station and places a burden upon it which it cannot afford to carry, all in favor of its competitors, Central, B. & O. and Nickel Plate.

B—The Proposed Action is Unlawful as It is Authorized by Directors Elected by Stock Acquired Contrary to Section 8683 of the General Code of Ohio.

B. & O., Central and Nickel Plate are admittedly consolidated corporations, organized under the laws of the State of Ohio as well as those of other States. (R. 291) As such they are subject to the laws of Ohio. It is admitted in pleadings that they are competitors of Wheeling, and consequently under Section 8683 of the General Code of Ohio, which provides:

> "*May purchase stock in other companies.*—A private corporation also may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition."

it was illegal for them to acquire stock control of Wheeling.

Mannington v. Hocking Valley R. R. Co., 183 Fed. 133;

Pollitz v. Public Utilities Commission, 96 O. S. 49.

The purpose of these statutes was and is to prevent one railroad from stifling competition by acquiring either the physical properties or stock control of a competitor. Yet B. & O., Central and Nickel Plate by means of their illegal acquisition of Wheeling stock are in control of Wheeling, and through their control thereof have authorized the contracts in question. As we have seen, if Wheeling is permitted to perform these contracts, Wheeling will be deprived of its favorably located passenger station site and will be burdened with an obligation to Terminals which Wheeling cannot afford to pay, and all for the benefit of Wheeling's competitors. To permit such to be done is, it is submitted, in violation of the letter as well as the spirit of the statutes of Ohio.

POINT VIII—THE ACTION PROPOSED REQUIRES STOCKHOLDERS' CONSENT BECAUSE

A—It Provides for a Change in Wheeling's Termini.

Mr. Duncan testified that the line of railroad which extends south from Wheeling's Ontario Street Passenger Station Site extends in a southerly direction in and through Cuyahoga, Summit, Portage, Stark, Tuscarawas, Holmes, Coshocton and Muskingum Counties, Ohio, to Zanesville in said Muskingum County. He further testified that such was the fact in 1916 and for many years prior thereto.

In the articles of incorporation of Wheeling (Exhibit 51), which was organized to take over The Wheeling & Lake Erie Railroad Company, we find on page 3 thereof:

> "The termini of the lines of the railroad to be purchased * * * are those hereinafter mentioned with respect to the lines of railroad formerly owned by The Wheeling & Lake Erie Railroad Company. * * *"

Amongst the lines thereinafter mentioned that were formerly owned by The Wheeling & Lake Erie Railroad Company is the following:

> "(6) A line of railroad beginning at the terminus thereof in Cleveland, Cuyahoga County, Ohio, and extending thence in a southerly direction in and through Cuyahoga, Summit, Portage, Stark, Tuscarawas, Holmes, Coshocton and Muskingum Counties, Ohio, to Zanesville in said Muskingum County."

This is the same line of railroad which, Mr. Duncan says, extends southerly from Wheeling's Ontario Street Passenger Station Site. And the terminus thereof is definitely stated to be at the beginning thereof, to-wit, Wheeling's Ontario Street Passenger Station Site. No doubt this particular designation of the terminus of the line in Cuyahoga County, a boundary county, is due to the provisions of Section 8746 of the General Code of Ohio, which provides as follows:

"*Terminus on state line or boundary.*—When a terminus named in the articles of incorporation is a county upon the line or boundary of the state, the president and directors of the company, upon the location of the road in that county, shall make and acknowledge a certificate definitely fixing the location in such county, and file it with the secretary of state."

Section 8745 of the Code provides:

"*Six main tracks.*—Any railroad company may maintain and operate, or construct, maintain and operate a railroad, with such main tracks, not exceeding six and such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road."

If the naming of a *city, village* or *place* in the articles of incorporation were sufficient if the city, village or place were in a border line or boundary county, there would be no reason for Section 8746 requiring the terminus in a border line or boundary county to be definitely fixed.

In Wheeling's return to questionnaire in Finance Docket 7299, we find the following (R. 183):

"Question 1. When the line in question was constructed, for what purpose or purposes, and its history as an operating unit from the time of construction up to the date of this return.

"Answer. The portion of the line of railroad proposed to be abandoned was constructed by The Connotton Valley Railway Company, a predecessor of the applicant, in the year 1883 to enable that company to construct a terminal on or near the site of the applicant's present Ontario Street passenger station. It has been continuously operated since its construction by The Connotton Valley Railway Company and its successors, including the applicant."

In its application in Finance Docket 7299, it is said (R. 176):

> "The applicant proposes to abandon that portion of its line of railroad extending northerly from the northerly line of Eagle Avenue a distance of 1035 feet to the *northerly terminus of applicant's line of railroad in the City of Cleveland, Cuyahoga County, Ohio,* together with its Ontario Street passenger station which is located on the portion of its line of railroad sought to be abandoned. Said Ontario Street passenger station is the principal and downtown passenger station of the applicant in the City of Cleveland, Ohio."

Thus there can be no question but what Wheeling is about to change one of its termini. Section 8747 of the General Code of Ohio provides as follows:

> "*Changes of line of terminal.*—By a resolution adopted by a majority of its board of directors, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, a company may change the line, or any part thereof, and either of the proposed termini, of its road. No change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed. Any subscription of stock made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change, shall be cancelled at the written request of a subscriber who has not consented thereto, filed with the secretary or other chief officer of the company, within six months after such change."

That Wheeling does not have the consent of its stockholders to the change of termini is not denied; that it does not propose to obtain the consent of its stockholders thereto is shown by the testimony of Mr. Duncan. (R. 291.) Wheeling, being an Ohio corporation, is beyond question subject to Ohio law and inasmuch as that which it proposes to do

calls for a change of its termini, the same cannot be done until the stockholders have consented thereto.

B—It Is an Aid and a Sale of Part of a Railroad to Another Railroad and a Lease of Part of a Railroad to Another Railroad.

Section 8806 of the General Code of Ohio provides:

"A company may aid another in the construction of its road, by means of subscription to its capital stock, or otherwise, for the purpose of forming a connection of the roads of the companies, if the road of the company so aided will not when constructed form a competing line."

Section 8807 provides:

"A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies. After such purchase the purchasing company shall be vested with all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and of branches thereto of the company from which it was purchased, including the power to acquire and appropriate property therefor, and be subject to all the duties, obligations, and restrictions of such company."

Section 8809 provides:

"No such aid shall be furnished nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting assent thereto. In case of the lease of a railroad situ-

ate in whole or part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made."

That that which Wheeling proposes to do, to-wit, to sell its property to Terminals' nominee and take up terminal facilities in the new union depot of Terminals is "an aid" to Terminals can not be denied, nor can it be gainsaid but what the same is done for the purpose of connecting the road of Terminals with that of Wheeling. Similarly the contracts for the use of the tracks of Big Four and Erie, even though they be but for a temporary purpose, are made for the purpose of aiding Terminals to construct its tracks, on Wheeling's property while Wheeling is making temporary use of the facilities of Big Four and Erie, thereby permitting Terminals to connect its tracks with the tracks of Big Four and Wheeling.

In 35 *C. J.* 1139 it is said:

"The word 'lease' is frequently used to designate the contract by which the relation of landlord and tenant is created, and has been defined as a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of the parties, and as a contract for the possession and profits of land, for a determinate period, with the recompense of rent."

And on page 1141 it is said:

"In determining whether an instrument is a lease or creates a relation other than that of lessor and lessee, the intention of the parties as ascertained from the instrument itself will govern. In making a decision the court will give the instrument a reasonable construction, and will consider the circumstances surrounding the parties when the contract was made, and also a practical construction given the agreement by the parties. The question as to the proper construc-

tion of the instrument is one of law. While the use of words ordinarily used in a lease will be given weight in arriving at the intention of the parties, such use is not conclusive. Moreover, an instrument may be given effect as a lease, although the word 'lease' is not used. Where it plainly appears that the parties have made a lease, the court will declare the instrument a lease notwithstanding the insertion of a covenant which more appropriately belongs to an instrument of a different character. In a doubtful case the fact that rent was not reserved in any form is strongly indicative of an intention that the agreement should not operate as a lease."

The rights which Erie grants to Wheeling by virtue of the contract (Exhibit 16) (R. 134) and the rights which Big Four gives Wheeling by virtue of the contract (Exhibit 17) (R. 145) are in effect nothing more or less than leases of part of the tracks and depot facilities of Erie and Big Four to Wheeling. In each of these contracts Wheeling is given the right to use the property, to-wit, the rails and roadbed, of Erie and Big Four and the passenger station of Erie, and the right to the possession thereof and all for a certain rental reserved which Wheeling must pay Erie and Big Four.

The contract which Wheeling has to use the facilities of Terminals (R. 121) and for which it seeks the approval of the Commission is a lease by Terminals of its property to Wheeling under which Wheeling is entitled to certain rights of possession for a rental reserved.

The so-called option to sell to Building (Exhibit 11), which Wheeling admits it will exercise, is in reality nothing more nor less than a sale to Terminals, another railroad company. It is admitted in the pleadings and Mr. Duncan testified that Building was merely Terminals' nominee. (R. 288.) All negotiations leading up to the exe-

cution of the option contract to sell were had with Terminals and its representatives, either Mr. Van Sweringen or Mr. Bradley. At the Executive Committee meeting of Wheeling held July 3, 1928 (Exhibit 44) the Executive Committee recommended that the property be sold to Terminals for $1,600,000. In the report of the management to the Executive Committee, and which was later submitted to the Directors (Exhibit 48), it was likewise recommended that the property be sold to Terminals. At the July 11, 1928, Directors' meeting (Exhibit 45) a resolution was offered to adopt the recommendations of the Executive Committee, to-wit, to sell the property to Terminals for $1,600,000. (Exhibits 84, 85, 86.) When the Directors elected by appellant objected at the July 11, 1928, meeting of the Directors to the adoption of this resolution upon the ground, amongst others, that it was a sale of part of a railroad to another railroad to which stockholders' consent was required, the meeting was adjourned without action upon the resolution. Nine days later and at the July 20, 1928, meeting of the Directors (Exhibit 46) a resolution was adopted authorizing the execution of the option to sell *not with Terminals but with Building.* Mr. Duncan explains the change from Terminals to Building by saying that the action taken by the Executive Committee on July 3, 1928, recommended that the property be sold to Terminals or to "such other person or persons *on its behalf as it may designate* for the reason that Mr. Bradley was unable to say at that time who the buyer would be, apparently because he had not determined whether the contract for sale should be made with the Building Company or with some other company, but in any event it was to be guaranteed by the Van Ess Company." (R. 288.) Certainly, a statute requiring stockholders' consent to a sale by a railroad company of part of its property to another railroad company cannot be so easily evaded as by having

the purchasing railroad company nominate a private company as the purchaser.

It probably will be argued that Terminals is not a railroad inasmuch as it is organized under Chapter 1, Subdivision II, Division II, Title IX, of the General Code of Ohio, headed "Public Service Corporations Other Than Railroads." However, Section 9162 of the General Code of Ohio, applicable to union depot companies, and insofar as the same is here applicable, provides as follows:

> "* * * and thereafter it may contract and be contracted with, sue and be sued, locate and acquire rights of way and depot grounds and terminals, and appropriate so much land as is deemed necessary for such depot, tracks and terminals, *and shall have all the powers given to railroads* by the laws of this state for the purpose of acquiring, constructing and operating its depot, tracks and terminals. * * *" (Italics ours.)

Section 9168 provides:

> "All laws for the *protection of railroads* and their property, and *relating to or enforcing* the *duties and obligations of officers, agents, and employes of railroad companies to the public and to railroad companies, or to either, shall be applicable to the railroad tracks, property, officers, agents, and employes of such union company.*" (Italics ours.)

These two sections of the Code are clear and unambiguous and their effect is that, at least insofar as the acquisition of lands is concerned, the laws of the state applicable to railroads and enacted for the protection of railroads, are applicable to union depot companies. Therefore, Sections 8806, 8807 and 8809 of the General Code of Ohio would be applicable to a union depot company desiring to acquire the lands of another railroad company. If, as required by these statutes, a railroad in dealing with another railroad must have stockholders' consent, then in-

asmuch as a union depot company has but the same powers, it too must have stockholders' consent in dealing with another railroad.

C—Is An Extension of Wheeling's Line of Railroad.

One of the reasons, no doubt, why Wheeling applied to the Commission for authority to use the facilities of Terminals was because the use thereof necessitates the extension of Wheeling's line of road from its Ontario Street Passenger Station Site into the depot of Terminals, a distance of about 2000 feet. Section 8772 of the General Code of Ohio provides:

> "*Extension of line, how authorized.*—When a company desires to extend the line of its road beyond either of its previously designated termini, its president and directors may submit the question of such extension and change of termini to a meeting of its stockholders, to be called for that purpose by notice published for four consecutive weeks in some newspaper in general circulation in each county through or into which the road passes. If the holders of a majority of the stock, in person or by proxy, so determine, the president and directors, or a majority of them, shall make a certificate of the fact, naming the places of the new terminus or termini of the road, and the county or counties through or into which the extended line will pass, and file it in the office of the secretary of state. Such extension then shall be held to be a part of the original line of the road."

It is therefore respectfully submitted that, inasmuch as the action which Wheeling proposes to take is an aid to Terminals, a lease of part of the railroads of Erie, Big Four and Terminals to Wheeling, and a sale of a part of its property to Terminals or its nominee, and an extension of its line of railroad all without the consent of Wheeling's

stockholders or the stockholders of Erie, Big Four and Terminals, as required by Section 8809 of the General Code of Ohio, the same is illegal.

POINT IX—THE DISTRICT COURT ERRED IN FINDING AND HOLDING THAT THE STATUTES OF THE STATE OF OHIO REQUIRING STOCKHOLDERS' CONSENT MUST YIELD TO THE POLICE POWER OF THE FEDERAL GOVERNMENT.

In passing upon the question raised under Point VIII *supra*, the District Court in its opinion said (R. 495):

> "Lastly it is contended that the contracts of abandonment and user are illegal under the Ohio law in that they have not been approved by the required vote of stockholders of either Wheeling or Terminals. Matters of procedure and conditions precedent controlling the action to be taken are within the jurisdiction of the Interstate Commerce Commission, and, Congress having acted by vesting power in such Commission under the circumstances here involved, requirements prescribed by the state must yield to the paramount control of the federal government."

Appellant recognizes the well established principle of law that where the police power of the federal government and that of the state are in conflict the police power of the state must yield to that of the federal government. But this principle of law is applicable only to a situation where the police powers are involved. In the case at bar the State of Ohio gave life to Wheeling upon condition that it could change the termini of its road, that it could aid another railroad in the construction of its line, that it could lease or sell a part of its railroad to another railroad, that it could extend its line of railroad only upon obtaining the consent of a certain number of its shareholders. Such a regulation is not a police regulation; it is not one adopted for the benefit of the public health, safety or welfare, but is a re-

striction placed upon Wheeling for the benefit only of those who may from time to time see fit to acquire shares of stock in Wheeling. It is a rule of law affecting questions of internal management. The laws of Ohio and the laws of practically every state in the Union forbid a corporation from selling all of its assets without the consent of a given number of its shareholders. Yet under the doctrine announced by the District Court a single officer of a railroad company, without any authority from directors, shareholders or anyone else, could file an application with the Interstate Commerce Commission to sell all of its assets to another railroad and, if the Interstate Commerce Commission felt that such was for the public interest and issued a certificate of public convenience and necessity therefor, such officer could carry out the transaction whether or not the other officers, directors and shareholders of the company concurred therein. No support for any such principle of law can be found in the authorities.

When the laws of a state which creates a corporation say that that corporation can perform certain acts only on condition that it obtain the consent of a certain number of its shareholders, then unless and until the consent of that number of shareholders is obtained the corporation possesses no authority to perform that act. Certainly the police powers of the federal government cannot give to a corporation corporate authority to do that which the laws of the state which created it say it cannot do. Matters respecting the internal management of a corporation affecting corporate authority to act are certainly not subject to the police powers of either state or federal government. It seems that the mere statement of the proposition is its own refutation.

The District Court in support of its finding that the police power of the Federal Government superseded the necessity of stockholders' control cited the case of *Colorado*

& Southern Railway Co. v. U. S., 271 U. S. 153. In this case the Colorado & Southern Railway Company was granted permission by the Interstate Commerce Commission to abandon a part of its line of railroad located in Colorado. The State of Colorado claimed that under the charter of the railroad company it had no right to abandon a part of its line merely because the operation thereof will be accompanied by pecuniary loss, and still continue to enjoy the privileges of its charter by operating other parts of its line within the State of Colorado. This Court held that inasmuch as the operation of that part of the line of railroad which the Interstate Commerce Commission authorized the company to abandon would place a burden upon interstate commerce that the Interstate Commerce Commission had the authority to authorize the abandonment of that part of the line, notwithstanding the charter of the railway company under the State of Colorado. From the reported opinion it does not appear just what the charter provisions of the Railway Company were, but, in any event, whether the charter provisions required the railway company to operate all of the lines therein described for a certain given period of time, or whether the charter provided that it could not abandon any part of its line without the consent of the State of Colorado, such a provision was one which was inserted in the charter by the State of Colorado for the public welfare. It was not a provision inserted for the benefit of the railway company or its shareholders, nor one which prescribed any rule for the internal management of the corporation. It was clearly a case of where the police power of the state and that of the Federal Government clashed. The Colorado & Southern Railway Company under that charter provision could not have abandoned any part of its railroad so far as the State of Colorado was concerned, even though it had the unanimous consent of all of its shareholders, officers and directors. The same is equally

true of any other authority which can be found in the books applicable to the superiority of the police power of the Federal Government over that of the state. Counsel's search of the authorities has revealed not one case wherein it was held or even suggested that the police power of any government could supersede a requirement for the internal management of a corporation or breathe corporate authority into the fictitious soul of a corporation denied to it by the state of its creation.

It is, therefore, respectfully submitted that the District Court erred in finding and holding that the police power of the Federal Government superseded the requirements of the statutes of the State of Ohio requiring stockholders' consent, in order to give proper corporate authority to that which Wheeling now proposes to do.

POINT X—THE CONSIDERATION OF $1,600,000 SPECIFIED IN THE OPTION TO SELL IS INADEQUATE.

When we speak of Wheeling and Terminals we speak of the same people, for after all the controlling interests of both companies are the same. Thus Central, Nickel Plate and Van Sweringens as the controlling interests behind Wheeling are about to grant to themselves as the controlling interests behind Terminals and Building a vital part of Wheeling's property. They are about to pay themselves for the property. They occupy the position of being both buyer and seller, and consequently their dealings as a matter of law are to be given the closest scrutiny.

Let us examine their dealings as a seller. Immediately upon acquiring control of Wheeling those directors elected by Central and Nickel Plate, who theretofore had opposed every move made by Terminals to force Wheeling into the new station, suddenly favor it. Then they discover that their passenger station built in 1909 and used for nineteen years was built under a permit which required them to tear

it down in 1910. (Exhibit 6) On July 3rd, 1928 (Exhibit 48), the management discovers that its tracks are at level 65 and that its passengers must either ascend a stairway to level 92, the level of the street, or a grade of 13% up Vinegar Hill; that there was a probability that the City of Cleveland would condemn the station house either because it was a fire trap or because it was unsafe, and that within four or five years (from July 3rd, 1928) it would be necessary to construct a new station. Therefore the management recommended the sale of its station site. On July 17th, 1928, Wheeling's engineers make a somewhat similar report on the condition of Wheeling's property, attaching thereto a number of photographs to show the condition thereof. (See Exhibit 7.) At the hearing had in January before the Commission, they produced an independent engineer whom they employed to make a physical examination of their station house. Apparently alarmed at the condition in which he found it, they immediately applied to the Commission for an emergency order to temporarily cease the use of their station and although the Commission granted them the right temporarily so to do (without prejudice however to the rights of the parties interested in Finance Dockets 7298 and 7299 and without giving Wheeling the right to demolish their station or to abandon its line of railroad leading thereto) (See Appendix A hereto attached), they immediately, upon ceasing the use thereof, demolished the same in an effort to make certain that the property which they wanted to sell to themselves would be better suited to their purposes as the purchasers thereof. Thus we have the very unique example of a seller depreciating the value of the property which he seeks to sell.

What is their conduct as buyers? Despite the wonderful returns now being realized by Central in New York from the air rights over its own tracks, Central apparently does not believe that air rights in Cleveland have much

value. At least the most valuable part of the air rights in Cleveland were traded away by Central to Van Sweringens. (Exhibit 49.) They have the property they seek to buy from themselves appraised and they pick appraisers who are unfamiliar with the effect of railroad terminal development upon adjoining property, who have made no study thereof and who are unfamiliar with the value and uses of air rights. (R. 435, 446, 452, 462, 467, 475.) Their appraisers testified that air rights as such, over Wheeling's property, were of little value because, as they were advised by engineers, no caissons to support a superstructure could be sunk on Wheeling's property between the steam railroad tracks, due to the turn-outs and cross-overs, and the cost of spanning the same was prohibitive. While their real estate experts so testified, yet their engineer, Mr. Jouett, admits that the plans prepared for work upon Wheeling's property, particularly the tunnels to be built for the accommodation of traction cars, call for proper allowances being made for the sinking of caissons to support superstructures (R. 351) and he admits that the spans which in his opinion would have to be made over the steam railroad tracks crossing Wheeling's property would be no greater than the spans made thereover in the construction of the Medical Arts, Builders Exchange and Garage building immediately across the street from the north end of Wheeling's property. Thus their real estate appraisers tell us one thing while their engineer, who has charge of the construction work which they propose to do, tells us another.

So that as buyers anxious to obtain the air rights for their *Building* company, they attempt to belittle the uses to which the property which they seek to sell to themselves can be put.

Mr. Philip Platten, who made a study of terminal and air right developments in New York and Chicago, one of

the real estate witnesses of appellant, says that that part of Wheeling's property which is colored yellow on Executive Committee's Exhibit No. 4 (attached to Exhibit 48) and on which is written the words "Building Area 74,515.5 sq. ft.," containing 97 feet front on Huron Road proposed, and 493 feet front on Ontario Street, is reasonably worth in his opinion $87.50 per square foot; that the right of way area shown upon the same map containing 34,826.1 square feet, is reasonably worth $17.50 per square foot or a total of $7,125,000. Mr. O. C. Saum, who likewise made a study of terminal and air right developments in New York and Chicago, testified that these two parcels were in his opinion of the value of $92.14 per square foot and $18.21 per square foot respectively, or a total of $7,500,000. Wheeling and Terminals admit that Van Sweringens, less than one thousand feet north along Ontario Street, sold seventy-one odd thousand feet of air rights alone to the public in the form of land trust certificates at $82.50 per square foot. (R. 473.) Of course, these air rights are located right on the Public Square. They have more value than air rights over Wheeling's property. But if air rights on the Public Square are worth $82.50 a square foot, it is not at all out of reason to say that property including both sub-surface and air rights located but one thousand feet away is worth a similar amount. In making such a comparison, and it is indeed a proper one, you are not making the comparison of a seller selling to himself, but you are making a comparison based upon deals made at arm's length.

Let us make another comparison as to value. By referring to Executive Committee's Exhibit No. 1 attached to Exhibit 48, we find thereon a parcel of land outlined in brown containing 5,677 square feet of land marked "Leased by W. & L. E. Co. from Walworth Estate." This parcel has a frontage of 121 feet on Ontario Street and a depth of but 47 feet. Is it not fair, to say the least, that Wheel-

ing's property, of which the Walworth Estate parcel is a part, as outlined on Map No. 4 to the same Exhibit, having a greater frontage not only on Ontario Street but also on Huron Road proposed, and a much greater depth, is worth as much as the Walworth property? The Walworth property was purchased in October, 1927 (R. 416, 418), from the Walworth Estate represented by The Cleveland Trust Company with whom Mr. McCaslin, a Wheeling appraiser, is associated. Mr. Harris Creech, a director of Wheeling, is likewise President of The Cleveland Trust Company. The price paid was $168,500.00 subject to Wheeling's 5% reappraisal lease (R. 418). Wheeling's appraiser, Mr. Cragin, was associated with Walworth in making the deal (Record, page 463), and he admits that Walworth's property subject to Wheeling's lease was worth $168,500.00 (Record, page 465). Mr. McMichael (R. 444) and Mr. Fackler (Record, page 429), both of them Terminals' appraisers, admit that the Walworth Estate parcel was worth $168,500.00. This is upon the basis of $29.68 per square foot, subject to Wheeling's lease. Yet these same witnesses in appraising Wheeling's property, located nearer the Square, on the corner of Ontario and Huron with frontage on Ontario, Huron, Canal Road and Eagle Avenue, containing in one assembled plot nearly twenty times as much land as the Walworth Estate, place values on what they call Wheeling's Building site of $20.00 and less per square foot, free, clear and unencumbered. Mr. McMichael testified that Wheeling's lease on the Walworth property was worth $40,743.81 (R. 444). Mr. Fackler, another Terminals witness, testified that it was worth $40,000.00 (R. 430). So that the value of the Walworth Estate free, clear and unencumbered, was according to their own witnesses $168,500.00 plus $40,743.81 or a total of $209,243.81 for 5,677 square feet, or $36.85 per square foot. Contrast this with the $20.00 per square foot

value placed on Wheeling's property by Mr. A. S. Taylor upon the basis of whose appraisal of $1,600,000 Wheeling made its deal. If the Walworth Estate parcel, which is parcel 73 on Exhibits 124 and 135, and which is only 121 feet front on Ontario Street and 47 feet in depth, and on which there were no buildings, is worth $36.85 per square foot, then certainly Wheeling's property, of which the Walworth parcel is a part, a corner parcel of much greater area and located closer to the Public Square, is worth just as much. On this basis then, Wheeling's building area of 74,515.5 square feet at $37.00 per square foot is alone worth $2,757,055.00. The right of way parcel containing 34,826.1 square feet would be worth 20% of the front area (an acknowledged basis for the valuation of rear property), or $7.50 per square foot, or $261,195.00, making a total valuation for Wheeling's property of $3,018,250.00. And this does not take into consideration the fact that Wheeling's property is a ready assembled plot of land having 97 feet front on Huron Road, 492 feet front on Ontario Street, with frontage for its entire distance on Canal Road and some frontage on Eagle Avenue. The figures used are the figures of the witnesses of Terminals and Wheeling, who admit that they have never made any particular study of the effects of terminal development or air rights and who, based on what they were told, were of the opinion that air rights over Wheeling's property were of little value due to "the excessive cost of construction." They admit that their testimony is based to a large extent upon prices paid for property in the neighborhood which were furnished to them by Terminals as shown upon Exhibit 123, which inaccurately set forth the cost as is shown by Exhibit 135. That most of the prices paid for property in the neighborhood are of little value is shown by an examination of Mr. McIntosh's testimony (R. 406 *et seq.*), giving the dates and mode of acquisition of the parcels involved. This

testimony discloses that the prices paid were prices paid years ago, as far back as 1912 in some instances, or prices paid for fees subject to ninety-nine year leases negotiated at low rentals and held by the Van Sweringens prior to 1918, the value of which leases was not included in the cost given in the Exhibit. It is not surprising then that we have the low valuations and appraisals made by witnesses for Wheeling and Terminals who, it should likewise be noted, have at times represented Terminals in acquiring other parcels. (R. 427, 461) These witnesses were naturally trying to keep the value as low as possible. They were guided largely by the character of the district as it has existed for many years past, a character which suggested anything but something of value, because the Van Sweringens who were buying up the property refused to make any long term leases thereon or to sublease the same for any period of time or to make any repairs thereto, thus driving business away and tending to decrease or detract from the value of the land. They frankly admit that they failed to consider the value of Wheeling's property in view of the terminal development as it existed on July 3rd, 1928, and as the plans of it were then known to be. We submit there is a decided difference between the situation where a terminal is suggested contingent upon the acquisition of certain property and where a terminal development has become an established fact and large buildings have been erected in connection therewith and the entire character of the neighborhood has been changed thereby. In the latter case, we claim the right to be paid for the added use to which our property may be devoted by reason of the proximity of the terminal development. In this we are not demanding a "necessity" price but only that we be paid for our property on the basis that the uses to which the same can be put have been greatly enlarged by virtue of the development; and we claim that the fact that the

prospective purchaser has brought about the development and made possible these additional uses is beside the point.

It will be contended by Wheeling and Terminals that without Wheeling's property there can be no terminal development, and that consequently the terminal development has no place in considering the value of Wheeling's property. If Wheeling's property were privately owned, all that Terminals could do would be to appropriate an easement therein for the use of its tracks, trains and cars between Levels 52 and 72. The owner of the property would have a right to put the property to any use that he desired not inconsistent with such easement. That the development of air rights above Level 72 is not inconsistent with the use of the property for railroad purposes between Levels 52 and 72 has been proven in this case beyond doubt by the testimony of Mr. D'Esposito (R. 364 and Exhibit 121), one of Terminals' witnesses, and that of Mr. Jouett who admits that the plans for construction work upon Wheeling's property call for future air right development. So that even though the property were privately owned, subject to condemnation, the private owner could reap substantially all the benefits of the terminal development. Wheeling is in a much more favorable position because its property cannot be appropriated and it can, and we submit that it should, say to Terminals, "We'll give you an easement upon the basis of proper compensation but in addition to reserving the air rights we want you to permit us to connect our property underground with your station." Thus Wheeling could be presently paid the fair reasonable value of an easement through its property and reserve the air rights with the right to connect underground with the station area of Terminals, and thus become a part of the great "City under one tent" which Mr. Bradley, President of Terminals, in his article (Exhibit 108) says they are building on the Square. As Terminals'

witnesses have utterly disregarded these possible additional uses of the land, we submit that their valuations are of little worth. This article was written at the time Mr. Bradley was concluding arrangements for the purchase of Wheeling's property and should have more force than the statements of witnesses called on behalf of Terminals to testify to the lack of effect of the terminal development upon Wheeling's property. Mr. Bradley definitely states that Terminals will have a stimulating effect upon Play House Square in Cleveland, which is located, as the evidence shows, at Euclid and 14th Street, four times as far away from the corner of the Public Square as is the property of Wheeling. Mr. Bradley calls attention to the fact that traffic formerly going through the Square will now be diverted to new Prospect and new Huron Roads. All witnesses admit that traffic and transportation has a very decided effect upon value and if Huron Road as proposed will divert traffic, it will divert traffic right to the corner on which Wheeling's property is located, to-wit, Huron and Ontario Streets. The effect of the Grand Central Terminal in New York should clearly indicate to us the effect that the new terminal development will have upon property in Cleveland located as close to it as is the Wheeling property, directly across the street from the Medical Arts, Builders Exchange and Garage Building which is connected, underground, like other buildings in the same group, with the terminal station. As we have seen, Wheeling, whose property cannot be appropriated, and who by granting an easement at what it is reasonably worth and not at a "necessity price," can reserve air rights and the right to connect underground with the terminal station and thus become a part of the "city under the tent," is indeed in a very favorable position, and when the testimony given herein is carefully analyzed and the effects of the terminal development in other cities are considered, it is submitted

that the values placed upon Wheeling's property by Mr. Platten and Mr. Saum of $7,125,000 and $7,500,000 are substantiated by the record.

POINT XI. WHEELING HAS NOT HAD THE BENEFIT AND JUDGMENT OF A DISINTERESTED DIRECTORATE.

In 1921 the directors of Wheeling authorized the filing of a protest with the Interstate Commerce Commission in Finance Docket 1237, protesting the granting of a certificate of public convenience and necessity to Central, Big Four and Nickel Plate to construct, through their control of Terminals, a union depot on the Public Square. In the intervening petition and protest filed by Wheeling it is stated (pp. 2 and 3, Exhibit 82):

> "Such passenger station is more centrally located with reference to the retail business, the financial, hotel and theater districts, than the passenger station of any other carrier entering Cleveland, and such passenger facilities admit of development to meet the reasonable future requirements of the intervener. Such facilities are adequate and constitute an integral part of the railroad of this intervener, without which it will be impossible for it to discharge its duties as a common carrier.
>
> "This intervener's interest in the application is due to the effect the construction of the facilities, with respect to which said applicants are seeking authority, will have upon said intervener's main freight and passenger facilities at Cleveland, Ohio, all as more fully hereinafter set forth. * * *
>
> "The passenger terminal facilities proposed to be constructed by the Terminals Company, as disclosed by an inspection of the application, the exhibits, and the answers to the questionnaire filed herein, * * * will completely destroy the present main passenger station and the facilities connected therewith known as the Ontario Street Passenger Station of this intervener, depriving the intervener of the use of its property, al-

ready devoted to a public use, in favor of the applicants' proposed use thereof; all contrary to law and in violation of the rights of this intervener under the constitution of the State of Ohio and the Constitution of the United States of America."

Nothing has happened from 1921 on down to date which changes the situation as so represented to the Commission in 1921. From the testimony of Mr. Duncan (R. 275 to 284), we learn that negotiations were had between Terminals on the one hand and Wheeling on the other, in which efforts were made to induce Wheeling to grant Terminals some rights in and to Wheeling's property and to have Wheeling use the union depot facilities of Terminals. During all this period of time Wheeling was under the control of the Rockefellers and the negotiations conducted by Terminals met with no success, and indeed for the very obvious reason that the gross passenger revenue received by Wheeling from its Ontario Street Passenger Station (R. 223) never at any time from 1923 on down to date exceeded $130,000, per annum, and from 1923 on down to date there has been a gradual decline in revenue receipts, due, as Mr. Durham, vice president and general manager of Wheeling, says, to motor vehicle competition. (R. 224.) In 1927 and 1928 Wheeling's gross passenger revenue from the Ontario Street Passenger Station was only $82,000 a year. Wheeling therefore could not afford, and cannot today afford, to pay what it should pay in order to use the union depot facilities of Terminals. In 1925 when the question of building the Eagle Avenue ramp was discussed by Terminals, the City of Cleveland and Wheeling, Wheeling protested and refused to consent to the terms and provisions of the Eagle Avenue ramp ordinance for the reason that the construction thereof would preclude the possible joint use of Wheeling's property by both Terminals and Wheeling and would force Terminals or Wheeling to give way, and Wheel-

ing was not willing to give way because it was not willing to give up its favorably located passenger station site and because it could not afford to use the union depot facilities of Terminals. At this time in 1925 Mr. Duncan, president and chairman of Wheeling, (R. 281) suggested the building of what he calls the Canal Ramp which would have afforded access to and from the flats in identically the same way in which such access is now furnished by the Eagle Avenue ramp, but the construction of the Canal Ramp would have still permitted the joint use of Wheeling's property by both Wheeling and Terminals. Yet in the face of Wheeling's failure to consent to the Eagle Avenue ramp and its protest as to the passage of the Eagle Avenue Ramp Ordinance, the same was passed, Terminals accepted it and immediately proceeded to build the ramp without knowing whether it could ever complete it, for before it could complete it Wheeling's tracks which passed underneath it had to be depressed and lowered. This was the situation with which Terminals was confronted in the fall of 1926 and the early part of the year 1927. Wheeling would not be forced into a situation which beyond question spelled ruin for it.

Central with its 93% interest in Terminals and Nickel Plate with its 7% interest in Terminals, both of which companies had guaranteed millions of dollars of bonds of Terminals, were of course vitally interested in seeing to it that Terminals acquired a right across Wheeling's property. The Van Sweringens, in control of Nickel Plate, were likewise interested not only because of their control of Nickel Plate but because of their control of Building which was under obligation to deliver to Terminals for the sum of $1.00 a right of way across Wheeling's property. (Exhibit 49) Central, Nickel Plate and the Van Sweringens then buy control of Wheeling from the Rockefellers. They admit that they bought control in furtherance of what they call a four-party four-system plan of railroads, which is an admission

that it was done to stifle competition, but the inevitable conclusion is also there, that they bought control of Wheeling so that they could deliver to themselves Wheeling's Ontario Street Passenger Station Site in order to complete their depot. And this conclusion is indeed strengthened beyond question when identically the same men who, as directors under Rockefeller control, opposed Terminals every move, suddenly shift their position and then begin to work with Terminals in an effort that its depot might be completed, all over the protest and objection of appellant and other stockholders owning a majority of the common stock of Wheeling. Thus on the 14th day of December 1927 the same directors, who had refused to consent to the Eagle Avenue Ramp ordinance and had refused to consent to the lowering of its own tracks so that the Eagle Avenue ramp might be completed, consented thereto. (Exhibits 76 and 77) Mr. Duncan testified (R. 284):

> "In the fall of 1927 the City Solicitor told me that he had received instructions to take such steps as might be necessary so as not to delay the completion of the Eagle Avenue ramp and that meant that the Wheeling must either reduce its grade voluntarily or that the city would take such action as was necessary. I discussed the matter with all the officials of Wheeling and we reached the conclusion that in view of the many interests in the city, shippers and relations of all kinds, and in view of the fact that the terminal project, no matter what the opinion may have been in the earlier stages, had become a fixed idea in the city of Cleveland, it was not wise for us to continue to play what was not intended to be but what might be characterized as a holdup on our part of the city."

The many interests which Wheeling had in the City of Cleveland in the fall of 1927, "shippers and relations of all kinds," were identical with the interests which Wheeling had from 1918 down to 1927. Why is it that those in-

terests, as Mr. Duncan would have us believe, suddenly changed Wheeling's position? The fact that the union depot of Terminals had become a fixed idea in the City of Cleveland was established on January 6, 1919, when the people of the City of Cleveland voted in favor of initiated Ordinance No. 47,814 authorizing the mayor to enter into a contract with Terminals for the construction of its depot. Yet that fact made no difference in Wheeling's position from 1919 to 1927. Why then the change in the fall of 1927? The only answer is because stock control changed from the Rockfeller interests to Central and Nickel Plate, which were vitally interested in securing Wheeling's property and in having Wheeling enter the union depot. The District Court in its opinion said (R. 488):

> "Since Terminals was making no progress in the direction of acquiring the Wheeling station site, the New York Central, the Nickel Plate and the B. & O. Railroad Companies, which latter company had since joined as a prospective user of the terminal, each purchased, prior to May 1, 1927 and without the consent of the commission, one third of a controlling interest in Wheeling and proceeded to exercise such control in the election of the board of directors of that company. It is true that twelve of the fifteen original directors were reelected but the stock control of course tended to destroy freedom of action."

That *such freedom of action* was destroyed on the part of these twelve directors, all of whom held but a few shares of stock, is established by their very conduct. If Wheeling, in 1923 when its gross passenger revenue from its Ontario Street Passenger Station was $130,000 a year, could not afford to take up union depot facilities in the depot of Terminals, then most certainly it could not afford it in 1928 when its passenger revenue for the years 1927 and 1928 was only $82,000 a year. As the District Court said in its opinion (R. 495):

> "The existence of such adverse interests, to the extent that it might influence the exercise of fiduciary powers by directors, does not make void all actions of such directors. The contracts are not void but voidable. They are only to be scrutinized with the utmost care to determine their fairness. The minority interests are to be protected. If this question be open for consideration here our previous findings must dispose of it."

In other words, the District Court's previous finding, contrary to the express and only testimony in the case, to the effect that the user contract and the option to sell were interdependent and that the considerations therein expressed were single, resulting in a further finding that under such a consideration the transaction was a fair one, prevented the District Court from setting aside the contracts in question upon the grounds that they were voidable because, when considered in such light, the court found the transaction to be a fair one. As pointed out above, such a finding of the District Court that the contracts were one and that the consideration was single is not only contrary to the uncontradicted and express testimony upon that point, but is contrary to law. If, as Mr. Duncan testified (R. 291), the user contract and the option to sell and the considerations therein expressed were not at all dependent upon the other, then the user contract and the option to sell must be considered separately. When so considered, together with the actions of the identically same men prior to the time that Terminals' interests secured control of Wheeling and after the acquisition of such control, the fact that the rental of $20,000 per annum specified in the user contract is unjustly discriminatory and preferential and can be modified, and beyond question will be modified by the Commission to a rate which Wheeling admittedly cannot afford to pay, the fact that the consideration of $1,600,000 is an inadequate consideration and was found to be adequate by the District Court and two members of the Com-

mission only because Wheeling was to receive terminal facilities for a purported rental of $20,000, it is submitted that the record conclusively shows that the shareholders of Wheeling as a whole have not had the benefit and judgment of impartial, disinterested directors, to which it is in law entitled.

It is therefore submitted that the contracts so made between the majority interest in Wheeling and themselves as the controlling interest in Terminals are voidable and that they should be avoided, set aside and held for naught.

POINT XII. THE DISTRICT COURT AND THE INTERSTATE COMMERCE COMMISSION ERRED IN FINDING AND HOLDING THAT THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT JURISDICTION TO APPLY THE STATUTES OF THE STATE OF OHIO AND THE GENERAL PRINCIPLES OF LAW HEREINABOVE REFERRED TO.

With reference to these questions, the Commission said in its findings:

> "While the applicant has answered the allegations of the protestant relating to alleged violations of the laws of Ohio it contends that we are without jurisdiction to adjudicate those matters, and with this contention we agree." (R. 46)
>
> "In view of the plain wording of the statutes we are of the opinion that on the facts shown by this record we are without jurisdiction to prescribe the price at which the applicant in these proceedings must dispose of its properties after abandonment." (R. 53)

Laws are enacted for the benefit of the public and in the public welfare. If this be true, and counsel submits that it is true, then anything which is illegal cannot be in the public interest. Consequently, if the sole function of the Commission, in any given case, is to determine whether or not that which it is proposed to do is in the public interest, the Com-

mission must first determine whether or not it is illegal for the person to do that which he proposes to do. Furthermore, under paragraph 20 of section 1 of Title 49, U. S. C., the Commission is granted the power to issue certificates of public convenience and necessity as prayed for or to refuse to issue them or to attach to the issuance thereof such terms and conditions as in its judgment the public convenience and necessity may require. If the public convenience and necessity can never justify an illegal act, then the Commission under paragraph 20 of section 1 has the right to attach to its certificates conditions which would make legal the action proposed. This the Commission admitted in its report in this case (R. 53) that it does under some circumstances, particularly in applications for the abandonment of property. In granting certificates of abandonment the Commission has attached thereto conditions that the applicant shall first offer to sell its line to any person who might be willing to purchase it at not less than the fair net salvage value for continued operation. Does this not assume that the Commission will fix such price if the parties are unable to agree thereon?

Again, of what avail is it for the Commission to issue a certificate of public convenience and necessity authorizing a railroad to do a certain thing if the railroad has not the corporate authority to do that act? In the case at bar the question of the corporate authority of Wheeling to do that for which it sought the Commission's approval was directly put in question. Appellant claimed that Wheeling could do that which it proposes to do only in the event that it secured stockholders' consent. Certainly the Commission had jurisdiction to inquire into and determine that question.

Moreover, the Commission has jurisdiction over the issuance of stocks and bonds of common carriers. The purpose thereof, among others, is to see that no "water" is placed in the stock and to see that bonds are not issued

beyond the fair and reasonable value of a carrier's property. The public in buying such bonds rely thereon. Is it fair to the purchasing public that the Commission should at some later date permit a carrier to abandon and sell any part of its property for less than its true value? The one is but the corollary of the other.

The District Court in its opinion said (R. 494):—

> "While the Interstate Commerce Commission specifically held that it was without jurisdiction to prescribe the price at which the applicant (Wheeling) must dispose of its properties after abandonment and while we think that this question, as well as the question of the validity of the user contract, was inseparably joined with the question of public convenience and necessity, since both were parts of an indivisible whole, the evidence upon the whole case was fully presented to the commission and is now before this court and we are unable to say that the cash payment and the user contract combined, as we believe they must be considered, do not constitute just and reasonable consideration adequately compensating and protecting Wheeling. Viewed in this light the finding of public convenience and necessity by the commission appears amply supported by the evidence."

It is true that Wheeling does not want to sell or abandon its Ontario Street passenger station site until it knows whether or not it can procure the use of the union depot facilities of Terminals at the rental of $20,000. per annum specified in the user contract. This was the reason why Wheeling did not execute an out and out agreement to sell its property but rather entered into an agreement pursuant to the terms of which it has an option to sell and upon the exercise of which Building agrees to pay it $1,600,000. To this extent the option to sell is dependent upon the validity of the user contract, but, as pointed out above, and as Mr. Duncan expressly testified, the fact that Terminal facilities

were to be given Wheeling at a rental of $20,000. per year was not in any wise or sense taken into consideration in determining the fair value of Wheeling's land or the consideration of $1,600,000. specified in the option to sell.

Had the District Court followed the only and undisputed evidence in the case, and had it considered the user contract separate and apart from the option to sell, as Mr. Duncan, president and chairman of Wheeling, says they must be considered, it follows from what the court said that it is not in the public interest for Wheeling to carry out the terms of the user contract or the option to sell because Wheeling is not thereby properly protected nor is it receiving just, reasonable and adequate compensation.

It is no answer to say that the Interstate Commerce Commission is simply an administrative body and that it is not a court or judicial tribunal. In administering the duties imposed upon it by statute, it must of necessity construe those statutes. The authority that is given to the Interstate Commerce Commission by statute to permit carriers to do certain things under a certain given set of circumstances naturally assumes that that carrier has the corporate authority to do that which it proposes to do. Certainly, Congress never intended to invest in the Interstate Commerce Commission the right to breathe corporate authority into the fictitious soul of any corporation, and when the attention of the Commission is called to the fact that a carrier has not the corporate authority to do that which it proposes to do and that question is put in issue before the Commission, it must of necessity follow that the Commission must pass upon that question.

The fact that the statutes give to an aggrieved party the right to institute a suit to enjoin the order of the Interstate Commerce Commission, and the fact that our courts have held that it will disturb an order of the Interstate Commerce Commission only if it is contrary to law or

without evidence to support it, shows that Congress anticipated and the courts have recognized the right of the Interstate Commerce Commission to pass upon legal questions, and in order to make their authority so to do constitutional, the right to review their decision in that regard has been granted to the courts. It is therefore respectfully submitted that the District Court and the Interstate Commerce Commission erred in failing to hold and to find that the Interstate Commerce Commission did have jurisdiction to inquire into the question as to whether or not stockholders' consent was required to that which Wheeling proposes to do, and that it did have jurisdiction to inquire into and apply the general principles of law to ascertain whether or not the Directors of Wheeling were acting under the influence and control of the same interest that controlled Terminals and as to whether or not Wheeling is to acquire the fair and reasonable value of the property which it seeks to abandon.

POINT XIII. THE DISTRICT COURT ERRED IN FINDING AND HOLDING THAT THE QUESTION OF ADVERSE INTEREST OF WHEELING'S DIRECTORS AND THE QUESTION RAISED UNDER THE STATUTES OF THE STATE OF OHIO REQUIRING STOCKHOLDERS' CONSENT WERE MATTERS WHICH COULD NOT BE CONSIDERED BY IT.

The District Court in its opinion said (R. 495):

"In addition to this answer to complainant's contention it may also be said that these last two matters discussed constituted alleged private grievances as between complainant and but one of defendants (Wheeling) in which the other defendants are but indirectly and collaterally interested, if at all. In an action to set aside and annul an order of the Interstate Commerce Commission such separate and severable causes of action against other defendants cannot properly be

joined, collaterally raised or considered by the court. Cf. *Illinois Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 505; *Cleveland, C. C. & St. L. Ry. Co. v. U. S.*, 275 U. S. 404, 413-4."

The statement of the court to the effect that these matters of alleged private grievances were matters as between this appellant and the Wheeling, in which the other defendants are but indirectly and collaterally interested, if at all, is, it is submitted, contrary to a former statement found in the court's opinion and to the provisions of Equity Rule 37.

In the first part of the District Court's opinion the court, after reciting the names of the various parties to this action, said (R. 489):

> "The interest of the Big Four and the Erie Railroad Company in the litigation is found in that the certificates provide for temporary terminal facilities for Wheeling over the lines of the Erie and Big Four. The interest of the other defendants is obvious."

In other words, Erie and Big Four were interested because they have contracts with Wheeling in which they agree to permit Wheeling temporarily to use a portion of their tracks and the passenger station facilities of Erie, all subject to the approval of the Commission. Terminals is interested because of the user contract. Building is interested because of the option to sell. The Interstate Commerce Commission is interested because it authorized and granted the certificates of public convenience and necessity complained of. The United States is made a party by reason of the requirements of Section 46 of Title 28, U. S. C. (Judicial Code Section 208), in which it is provided:

> "Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the District Court against the United States."

Section 48 of Title 28, U. S. C. (Judicial Code Section 211), provides:

> "All cases and proceedings brought under Subdivision 27 and 28 of Section 41 of this Title and Sections 20 and 43 of Title 49 shall be brought by or against the United States and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

Section 42 of Title 49, U. S. C., provides:

> "In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

A suit to enjoin, annul or set aside an order of the Interstate Commerce Commission is not an appeal proceeding. It is an original action in equity, governed by the equity rules. Equity Rule 37 provides:

> "* * * And any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest may be joined on the same side as plaintiffs or defendants, but when any one refuses to join he may for such reason be made a defendant."

Every defendant named in the bill is certainly interested in knowing whether or not the action which Wheeling proposes to take and which the Interstate Commerce

Commission has authorized is voidable because authorized in the first instance by directors who are under the influence and control of the same interests which control Terminals, in whose favor the action is proposed to be taken. They are likewise all interested in the question as to whether or not Wheeling has the proper corporate authority to do that which it proposes to do or whether such action, authorized by the Interstate Commerce Commission, is lacking in proper corporate authority for want of stockholders' consent.

It is therefore submitted that the District Court erred in finding and holding that the issues so presented constituted alleged private grievances as between appellant and Wheeling alone, in which the other defendants were only indirectly or collaterally interested, and that such collateral issues could not be considered by the court in this action.

POINT XIV. THE DISTRICT COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE CERTAIN TESTIMONY OFFERED BY APPELLANT IN FURTHER SUPPORT OF APPELLANT'S CLAIM THAT WHEELING DID NOT HAVE THE BENEFIT AND JUDGMENT OF A DISINTERESTED DIRECTORATE.

The District Court in its opinion said (R. 495 and 496):

> "In thus directing the dismissal of the bill, we are treating the submission to us as one upon final hearing. We do not overlook the provision that plaintiff was entitled to offer evidence as to the so-called private grievances, unless the court should think that, as a matter of law, those alleged grievances must be excluded from consideration in this case. With our view of the validity and effect of the Commission's certificate we think this exclusion follows, and that the case is therefore ripe for final decree. As to those issues we in effect sustain a motion to dismiss.

"Nor do we overlook the possible confusion as to the power of this three judge court. As to the private grievances, jurisdiction seemingly exists by diverse citizenship, and those issues could be heard and decided by the local district judge. As he joins in this opinion and this dismissal, it seems to follow that, even if these issues do not go to the three judge court as incidental and collateral, yet the presence and concurrence of the other judges can do no harm. The decree is that of the District Court. If counsel think that it is separable for purposes of appeal, they can preserve their rights thereto."

Inasmuch as a suit to enjoin, set aside and annul an order of the Interstate Commerce Commission is an independent and original action in equity and not an action in the nature of an appeal or error proceeding to review that which the Interstate Commerce Commission did, it is again submitted that the same is governed by the equity rules. Equity Rule 26 provides:

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

It is a well known proposition of law that a court of equity, once having taken jurisdiction, will retain it to give full relief. In the *Chicago Junction* case, 264 U. S. 258, which suit was brought to set aside and annul an order of the Interstate Commerce Commission, the complainants likewise asked that the court decree and set aside the action of the New York Central Railroad Company which it

had taken pursuant to the order of the Interstate Commerce Commission but before the order itself became effective. The contention was made in this Court by the United States and the Interstate Commerce Commission that the District Court properly dismissed the bill for want of jurisdiction because, coupled with the suit to enjoin and set aside the order of the Interstate Commerce Commission, was an action to set aside that which the New York Central had done pursuant thereto and a prayer to restore the status quo. In disposing of this contention this Court said:

> "The objection is not that the bill is multifarious, or that it is otherwise in conflict with established equity practice. The argument is that the United States is a necessary party; that, against it, suit can be brought only when Congress gives consent; that the suit was brought necessarily and solely under the Act of October 22, 1913, c. 32, 38 Stat. 219, 220; and that the consent so given does not extend to a suit in which it is sought to set aside both the order and rights acquired by private persons thereunder. There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief to be afforded. The sale of the stock and the lease, which it is sought to set aside, were made immediately after entry of the order; that is, before expiration of the thirty days provided by paragraph 2 of Section 15; and before the plaintiff's petition to set aside or modify the order had been disposed of. To permit the joinder objected to could not prejudice the United States. To prohibit the joinder would, in large measure, defeat the very purpose of the bill and would clearly prevent that expedition in affording relief which it was the purpose of Congress to ensure. Act of February 11, 1903, c. 544, 32 Stat. 823. Moreover, the terminal companies, and the stockholders affected, were entitled to intervene as parties in the proceedings before the Commission; and they appeared by counsel. If they became parties to the proceeding before the

Commission, they were entitled under Section 212 of the Judicial Code, to become parties, also, to any suit brought to set aside the order. It was the policy of Congress to allow persons so situated to be joined in suits to enforce provisions of the Interstate Commerce Act. See Act of February 19, 1903, c. 708, Section 2, 32 Stat. 874, 848. If this suit had been brought by the United States, the court could have given the complete relief prayed for. *United States v. Union Pacific Ry. Co.*, 160 U. S. 1, 50; *United States vs. Union Pacific R. R. Co.*, 226 U. S. 61, 96. The same rule should apply where the suit to set aside the order is brought by a private party."

In *L. & N. Ry. Co. v. Garrett*, 231 U. S. 298, suit was brought to enjoin the enforcement of an order of the Railroad Commission of Kentucky upon the grounds that the same violated both the federal and state constitution. It was heard before a three judge court which denied a motion for a preliminary injunction. Appeal was taken to this Court where it was held that the order of the Railroad Commission of Kentucky was not in violation of the federal constitution but this Court retained jurisdiction of the case and passed upon the question as to whether or not the order of the Railroad Commission violated the state constitution. In the course of the court's opinion Mr. Justice Hughes said:

"Because of the Federal question raised by the Bill the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler vs. Louisville & Nashville Ry.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. 26 Stat. 557. This statute applies to cases in which the preliminary injunction is sought, in order to restrain the enforcement of a state enactment upon the grounds of its 'unconstitutionality.' The reference undoubtedly

is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality in this sense must be a substantial one. But where such a question is presented the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and separate hearing and appeal, with respect to the local questions which are involved in the case and would probably be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here."

In view of these findings and holdings of this Court it is submitted that the District Court in this case erred in dismissing the appellant's amended bill of complaint insofar as the same relates to what the court terms alleged private grievances. Your Honors will observe from the entry of the court (R. 484) that on September 10, 1929, when appellant's motion for a preliminary injunction came on for hearing, the court decided to hear the case upon the record of the proceedings had before the Interstate Commerce Commission and to continue the case upon the question of these alleged private grievances until it had decided what to do based upon the record of the proceedings had before the Interstate Commerce Commission. In deciding upon the latter point the court as a matter of law dismissed the amended bill of complaint as to the alleged private grievances upon the grounds that the three judge statutory court had no jurisdiction to inquire into the same in a proceeding to annul and set aside an order of the Interstate Commerce Commission. (R. 496) In this, we respectfully submit, the District Court erred and appellant should have been given an opportunity to present such additional testimony as it desired to offer.

POINT XV. THE QUESTION OF PUBLIC INTEREST.

A—From the Standpoint of Terminals.

Terminals' position upon this question is that it has spent or obligated itself to spend some $88,000,000 (R. 210) for the construction of its depot, all in accordance with plans which contemplate and require the use of Wheeling's property. In view of the fact that the construction which has taken place and for which Terminals has spent or obligated itself to spend this vast sum of money was done with knowledge of the fact that for its ultimate completion Terminals had to acquire a right across Wheeling's property, and the fact that Terminals did not know whether such right would ever be acquired, the argument merits little consideration. The public interest which it seeks to invoke in its favor by the expenditure of this large sum of money is a public interest which it itself has built up, not only with full knowledge of all the facts, but in face of Wheeling's opposition. It is an effort to pull itself up by its own boot straps. It is an argument in substance that because we have spent this vast amount of money for a large improvement we are now beyond the pale of the law.

Terminals further contends that if Wheeling is not permitted to abandon its favorably located passenger station site, then Terminals will have to acquire a right to pass underneath Wheeling and that in view of the Eagle Avenue ramp such passage will have to be, not at level 52 as contemplated, but down at level 30; that in so depressing its tracks in order to permit Wheeling to use the property above for its own station, a very bad grade will result, not only on the easterly approach to its depot, but extending throughout the station area to the east end of the westerly approach, all of which will result in an unsafe operating condition (R. 298, et seq.); that in addition to so depressing the tracks on its easterly approach and placing the tracks

in the station area on grade, all of the buildings which have been built over and above the tracks within the station area, such as the Terminal Tower Building, the Medical Arts, Builders Exchange and Garage Building, will have to be underpinned; that the cost of doing all this work will be in the neighborhood of $10,000,000 and will delay the completion of its depot for a period of two years. But again these facts were all known to Terminals in the year 1925 when Terminals and the City of Cleveland agreed upon the construction of the Eagle Avenue ramp in face of Wheeling's protest and in face of Wheeling's suggestion that, instead of building the Eagle Avenue ramp, a ramp which Mr. Duncan referred to as the Canal ramp, be built (R. 281). So again this claim is one which Terminals has built in its own favor with full knowledge of the disastrous results which it claims will follow should the Eagle Avenue ramp remain as it is and should Wheeling be denied the right to abandon its favorably located passenger station site.

The picture, however, is not as bad as Terminals seeks to paint it. The Eagle Avenue ramp which was built at a cost of $2,000,000, over Wheeling's protest and in face of Wheeling's objection, can be removed. A disinterested and impartial board of directors can be elected by stockholders legally qualified to vote and they can agree with Terminals upon the proper price to be paid by Terminals for the right to use Wheeling's property as originally planned at level 52. Wheeling can then maintain a passenger station in its present favorable location and where it has always maintained it, without the risk of being burdened with an obligation for passenger station facilities that it cannot afford to pay. In place of the Eagle Avenue ramp there can be constructed the Canal ramp, which will furnish the same access that the City of Cleveland desires to give between the level of Ontario Street and the flats located some

distance below. In so working out the problem and the situation not one moment's delay need be occasioned by Terminals in the construction and subsequent operation of its depot.

Moreover, it is submitted that the question of public interest here involved is not the public interest as viewed from Terminals' standpoint but it is the public interest from the point of view of Wheeling. Wheeling has outstanding $55,800,000 of capital stock, a funded debt of $25,500,000 (R. 185, 195), or a total of better than $80,000,000 in securities outstanding. To permit Wheeling to abandon and sell its passenger station site for less than it is reasonably worth and to take on an obligation for passenger station facilities which it admittedly cannot afford puts in jeopardy the $80,000,000 invested in Wheeling. Or to force Wheeling to give up its passenger station site in favor of Terminals and Wheeling's competitors and to build a passenger station of its own in a less favorable location is again to put in jeopardy the $80,000,00 invested in Wheeling securities, for with a passenger station not as well located as its Ontario Street Passenger Station, its passenger revenues are bound to decrease. As the District Court said (R. 491):

> "To so deprive the company of central access to the city and of advantageous location of its terminal, at the only alternative of paying a ruinous rental for terminal facilities in the Union Depot, could not possibly be conducive to public convenience or necessity so far as Wheeling, the territory it serves or its public is concerned."

Furthermore, since the easterly approach is to be acquired for Terminals by Building under the so-called land contract (Exhibit 49), the loss that Terminals will sustain, if any, by its inability to cross Wheeling's property at level 52 as originally contemplated, is a loss which will

fall, not upon Terminals or the public holding its securities or upon the railroad companies which have guaranteed the payment thereof, but will fall upon Building, a privately owned corporation. In other words, there will be no burden upon transportation as a result of making such changes in the terminal structure as may be necessary should Wheeling be denied the right to abandon its property. So far from being a burden upon transportation for Building to pay the cost of revamping the station, the fact is that the burden upon transportation would be relieved thereby as Wheeling, which is a common carrier, will not be running the risk of jeopardizing its $80,000,000 of securities by assuming an obligation that it cannot afford to pay.

In view of Terminals' contract with Building wherein Building agreed, for the sum of $1.00, to deliver to Terminals the easterly approach, it seems as though Terminals is being permitted to look after the private interests of Building for it is Building's obligation to furnish Terminals with the easterly approach. It therefore seems that Terminals, a common carrier, is here attempting to pull from the fire the chestnuts of private interests. Such conduct merits little if any consideration.

B—From the Standpoint of the City of Cleveland.

When on the 16th day of May, 1929, the District Court enjoined the execution of a contract which was the subject matter of the action of this appellant versus Wheeling, *et al.*, decided by the United States Circuit Court of Appeals, 33 Fed. 2nd 390, Manager Hopkins of the City of Cleveland presented himself at the hearing room of the Interstate Commerce Commission on the 17th day of May, 1929, and was permitted to make a statement which is a part of the record in this case. (R. 395, *et seq.*) The substance of it is that various bridges which Terminals is

constructing across various highways for the purpose of eliminating grade crossings, and other existing bridges which Terminals is widening to take care not only of steam railroad tracks but also Van Sweringens' rapid transit and street car tracks, are blocking and obstructing and causing detours upon some of the main thoroughfares of the City of Cleveland, the greater number of which are located miles from Wheeling's property easterly of East 37th Street. An examination of the plans here in evidence discloses that there are no such bridges across any of the highways the construction of which could in any wise be interfered with by the ability or failure of Terminals to cross Wheeling's property. This Manager Hopkins admitted upon cross examination, qualifying his admission by saying that if Terminals had any question in its mind about being able to cross Wheeling's property it would not be in a hurry to complete the bridges now under construction. (R. 396) Indeed it seems strange that Terminals should hesitate. Ever since 1921 it has been constructing its depot without hesitancy and without knowledge of the fact as to whether it could cross Wheeling's property, and from 1921 on up until 1927, it proceeded in face of Wheeling's protests. Any delay which Terminals might bring about in completing the bridges complained of by Manager Hopkins would therefore be due solely to the free and voluntary act of Terminals, which had no business to undertake their construction until it knew or had reasonable grounds to believe that it could procure a legal right to cross Wheeling's property. Manager Hopkins himself admits that Terminals displayed poor business judgment in going forward with its project without knowing whether it could use Wheeling's property, but he fails to admit that when he as City Manager insisted upon the construction of the Eagle Avenue ramp instead of the Canal ramp, at an elevation which made it impossible for Wheeling and

Terminals to make joint use of Wheeling's property, he displayed poor business judgment in not ascertaining whether Wheeling would or could afford to use the facilities of Terminals or would or could afford to abandon its own favorably located passenger station site. He admits that at the time he insisted upon the building of the Eagle Avenue ramp both Terminals and Wheeling objected upon the grounds that the construction thereof would eliminate the possibility of the joint use of the property by Terminals and Wheeling, but this objection, he says, was ironed out with Terminals before the Eagle Avenue ramp ordinance was passed (R. 399), and that the ordinance was passed in face of Wheeling's opposition.

So far then as the City of Cleveland is concerned its spokesman and representative, Manager Hopkins, was at fault in insisting upon the construction of the Eagle Avenue ramp in face of Wheeling's protest. The situation in which it finds itself is likewise one of its own making, and is therefore entitled to little if any consideration.

C—From the Standpoint of Wheeling.

Wheeling, in an effort to show the benefits which would accrue to it and the traveling public which it serves were it to use the facilities of Terminals, produced testimony to show the connections which passengers arriving on its trains could make with the trains of Central, Big Four and Nickel Plate; the convenience which would be afforded to its passengers by their ability to go to a number of buildings built over the station proper and connected under ground therewith (R. 242); the proximity of the public buildings in down town Cleveland to the union depot of Terminals as compared with its Ontario Street passenger station (R. 243); the proximity of the depot of Terminals to loading points of street car lines as compared with the distance to the same loading points from Wheeling's

Ontario Street passenger station (R. 257). In each case the distance to public buildings in down town Cleveland and loading points of street car lines was figured to the entrance of Wheeling's Ontario Street passenger station site and the nearest entrance to the union depot of Terminals. By reference to Exhibits 36, 37, 38 and 39, we observe that the distance from any pedestrian entrance to the ticket offices and waiting rooms in the new depot of Terminals is about 600 feet; thus 600 feet must be added to each one of the distances so shown in the testimony before you can correctly compare the distance from public buildings and street car loading points to the waiting rooms and ticket offices of the new union depot of Terminals and that of Wheeling's Ontario Street passenger station. Moreover, it is the position and contention of appellant that all of the benefits which Wheeling claims will inure to it if authorized to use the union depot of Terminals can be obtained by a disinterested Board of Directors for Wheeling by continuing to use Wheeling's Ontario Street passenger station. A disinterested and impartial Board of Directors would not run the risk of burdening Wheeling and jeopardizing its security holders by using the facilities of Terminals at a price which it cannot afford or by abandoning its favorably located passenger station in favor of one not so favorably located. A disinterested and impartial Board would insist that the Eagle Avenue Ramp built over Wheeling's protest be removed; that Terminals pay Wheeling the fair, reasonable value of a perpetual easement, enabling Terminals to maintain its tracks at level 52, as originally contemplated, and that Wheeling reserve the right to build and place thereover its own passenger station connected under ground, as it readily can be, with the union depot of Terminals. Wheeling's passengers could then walk under ground to the waiting rooms and ticket offices of Terminals, a distance of somewhat less than 500 feet, and make the same connections

with all the trains of Central, Big Four and Nickel Plate that it could make if Wheeling's trains ran into Terminals' depot. Wheeling's passengers would then have under ground access to all of the same buildings to which they would have access if Wheeling used the union depot of Terminals, and Wheeling in this way would be running no risk of being burdened with an obligation for passenger station facilities which it cannot afford, would be running no risk of having to build a passenger station in some less favorable location, and will reap, as we contend Wheeling is entitled to reap, the benefit of the development which Terminals has brought about upon the Public Square.

When viewed in this light, it is submitted, it is not in the public interest for Wheeling to abandon its favorably located passenger station site and run the risk of being burdened with an obligation which it cannot afford to pay, at the only alternative of having to locate a passenger station somewhere else in down town Cleveland not as favorably located as the one which it now seeks to abandon.

Beyond question, Terminals will attempt to argue and invoke in this case the doctrine of relative convenience and injury. Clearly such a doctrine cannot be invoked for the purpose of permitting that to be done which is otherwise illegal. Moreover, the doctrine is invoked only where the equities are equal and in this case they are far from such. The loss to be sustained by enjoining the order of the Commission is a loss which was apparent to Terminals at the time it began to construct its depot in 1921. It knew then, from Wheeling's intervening petition in Finance Docket 1237, that it had to reckon with Wheeling, but, nevertheless, went forward and spent its money and put off the evil day. Over the protest of Wheeling it accepted in 1925 the provisions of the Eagle Avenue Ramp Ordinance, knowing that the acceptance thereof and the construction of the Ramp would put an end to the possible joint use by both it

and Wheeling of Wheeling's property. Terminals might attempt to argue that the City of Cleveland forced it to accept the Eagle Avenue Ramp Ordinance, but there is no provision in the original initiated Ordinance No. 47814 which constituted the contract between the parties that gave to the City of Cleveland any right to change the contract thereby created without the consent of Terminals. Section 91-7 of Ordinance No. 47814 (Exhibit 110) provides as follows:

> "If at any place or places in connection with the work herein described, it shall be deemed advantageous to change the construction in any respect, without affecting the general occupation of the street nor the changes in said street to be made, or the minimum clearance described, such change or changes in the location of thoroughfares or relocation of thoroughfares which may be desirable from the standpoint of the City or the Terminals Company, as a result of final preparation of completed detailed plans of the Terminals Company's undertakings as set forth herein, or as a result of complete City plans now in process under the supervision of the City Plan Commission, or for any other reason, such change or changes may be made according to a written memorandum of the same, approved by the City or its duly authorized representatives and the Terminals Company."

This clearly calls for mutual consent for the change of the contract, and the fact is that Terminals consented to the Eagle Avenue Ramp Ordinance over Wheeling's protest. Certainly, inasmuch as the position in which they find themselves is one of their own making, Terminals is not in a position to invoke the doctrine of relative convenience and injury. On the other hand, equity has always aided the vigilant and up until the time that the control of Wheeling passed into the same hands that controlled Terminals, Wheeling was ever vigilant in the protection of its rights. From the time that the interests which control Terminals

acquired control of Wheeling down to the present time, the appellant and its officers, who represent in all a majority of the preferred and common stock of Wheeling, have ever been vigilant in asserting its rights.

SUMMARY OF ARGUMENT.

It is respectfully submitted:

I. That Terminals is a common carrier for hire subject to the provisions of the Interstate Commerce Act and/or the laws of the State of Ohio and to regulation by the Interstate Commerce Commission and/or the Public Utilities Commission of the State of Ohio, and that as such it must file schedules of its rates and charges, it cannot make preferential contracts and cannot grant rebates.

II. That Paragraph 4 of Section 3 of Title 49, U. S. C., while applicable to a terminal built by one or more carriers for its or their exclusive use, is not applicable to Terminals, which is building a union depot for all those who may choose to use it and which has professed to serve any and all who desire to use it.

III. That if Paragraph 4 of Section 3 of Title 49, U. S. C., is applicable to Terminals, nevertheless the authority therein granted to agree with the carrier desiring to use its facilities as to the terms of such use, is no authority to agree upon rates which are unjustly discriminatory and preferential.

IV. That the user contract under which Wheeling proposes to use the depot facilities of Terminals is not in accordance with any filed tariff; that it is unjustly preferential and discriminatory, that it does provide for a rebate and is consequently illegal.

V. That the findings of the Commission with respect to the preferential character of the user contract are con-

trary to law and arbitrary in that they ignore the testimony offered with respect thereto.

VI. That the findings of the District Court that the user contract and the option to sell are wholly interdependent and the considerations therein expressed are single and that when so considered, together with the financial condition of and the strategic position occupied by Wheeling, the terms thereof are just and reasonable, are contrary to law and the undisputed testimony.

VII. That the Interstate Commerce Commission did have jurisdiction to withhold its certificates of public convenience and necessity by reason of the fact that the action proposed to be taken by Wheeling was authorized by directors elected through the votes of stock acquired by Central, B. & O. and Nickel Plate contrary to Section 7 of the Clayton Act and Section 8683 of the General Code of Ohio, after Clayton Act complaints had been issued and served upon Central, B. & O. and Nickel Plate, the effect of the action so authorized and proposed to be taken by Wheeling being to substantially lessen competition between Wheeling on the one hand and Central, B. & O. and Nickel Plate on the other, in that the action proposed to be taken by Wheeling imposes a burden upon Wheeling which it cannot afford to carry, resulting in a sale of Wheeling's property at less than its true value and places Wheeling in a position where it will either have to bear a burden which it cannot afford or seek passenger station facilities in a less favorable location than its present passenger station site, the result of which, beyond question, will be to decrease its passenger revenues.

VIII. That the action proposed to be taken by Wheeling is illegal for want of stockholders' consent as required by Sections 8747, 8809 and 8772 of the General Code of Ohio.

IX. That the finding of the District Court to the effect that the requirements of the statutes of the State of Ohio, requiring stockholders' consent to that which Wheeling proposes to do must yield to the paramount control of the Federal Government over interstate commerce, is contrary to law for it is an attempt through the exercise of the police powers of the Federal Government to vest Wheeling with corporate authority to do that which the laws of the State of Wheeling's creation say that Wheeling can do only upon obtaining the consent of its stockholders.

X. That the consideration of $1,600,000 specified in the option to sell is inadequate; that by reason thereof such contract is voidable and should be avoided, and that the District Court and the Interstate Commerce Commission erred in failing to so find.

XI. That Wheeling has not had the benefit and judgment of a disinterested directorate and that by reason thereof the user contract and option to sell are voidable and should be avoided and the District Court and the Interstate Commerce Commission erred in failing to so find.

XII. That the Interstate Commerce Commission did have jurisdiction to consider and apply the statutes of the State of Ohio and the general principles of law applicable to the questions raised before it.

XIII. That the District Court erred in finding and holding that the question of the inadequacy of the consideration specified in the option contract and the question of the necessity of stockholders' consent to that which Wheeling proposed to do were alleged private grievances as between the appellant and Wheeling which could not be properly joined, collaterally raised or considered by the court in an action to set aside and annul an order of the Interstate Commerce Commission.

XIV. That the District Court erred in sustaining in effect a motion to dismiss the amended bill of complaint as to those issues raised therein applicable to the inadequacy of the consideration specified in the option to sell, and voidability of the contracts due to the fact that Wheeling did not have the benefit and judgment of a disinterested directorate, and in refusing to permit appellant to offer testimony in support thereof and in addition to that which was offered before the Interstate Commerce Commission.

XV. That it is not in the public interest to permit Wheeling to carry out the terms of its user contract and option to sell, for the reason that the same will deprive Wheeling of a favorably located passenger station site and will burden Wheeling with an obligation which it cannot afford to carry at the only alternative of acquiring some other passenger station site which cannot be and will not be as favorably located as the one which it now seeks to dispose of.

Respectfully submitted,

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APPENDIX A.

SERVICE ORDER NO. 48.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 6, held at its office in Washington, D. C., on the 24th day of January, A. D. 1929.

The question of the temporary discontinuance by the Wheeling & Lake Erie Railway Company of its passenger trains in passenger and allied service into and out of its Ontario Street Passenger Station, located in the City of Cleveland, Ohio, and the temporary joint use by said Wheeling & Lake Erie Railway Company of the tracks of the Erie Railroad Company and Cleveland, Cincinnati, Chicago & St. Louis Railway Company including the station facilities of the Erie Railroad Company in said City of Cleveland, being under consideration, and

It appearing, that the Wheeling & Lake Erie Railway Company has filed with this Commission an application for a Service Order to carry out the purposes set forth in the preceding paragraph because of the unsafe condition of its Ontario Street Passenger Station making the further use thereof a possible hazard to the public, and

It further appearing, that said Wheeling & Lake Erie Railway Company has filed with the Commission under Finance Dockets Nos. 7298 and 7299 petitions requesting certificates of public convenience and necessity authorizing it to operate temporarily in the Superior Avenue Station of the Erie Railroad Company; and for a period of one hundred years to accept passenger station facilities and service in the new Union Depot of the Cleveland Terminals Company; and to abandon its Ontario Street Passenger Station, and

It further appearing, that the City of Cleveland will not issue a permit for the necessary repairs to floors and

supports of said Ontario Street Passenger Station for reasons set forth in said application, and

It further appearing, that by reason of said unsafe condition of said Ontario Street Passenger Station of the applicant a possible public hazard and emergency is created which requires the immediate action of the Commission, and

It further appearing, from said application that the applicant has secured the consent of the Erie Railroad Company and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for the joint use of necessary tracks, and facilities to accomplish the purposes set forth in said application.

It is therefore ordered and directed, effective forthwith, that the applicant, the Wheeling & Lake Erie Railway Company, be, and it is hereby, authorized to temporarily discontinue the operation of its passenger trains in passenger and allied services into and out of its Ontario Street Passenger Station in the City of Cleveland, and over the tracks leading to such station as fully described in the application, and

It is further ordered, that the applicant, the Wheeling & Lake Erie Railway Company, be, and it is hereby, authorized to operate in passenger and allied services the tracks and station facilities of the Erie Railroad Company and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, fully described in said application, and

It is further ordered, that this Service Order is issued without prejudice to the rights of the applicant and interested parties in Finance Docket Nos. 7298 and 7299, and that this order shall continue in force until final decision of the Commission in said Finance Docket Nos. 7298 and 7299.

It is further ordered, that a copy of this order and direction be served upon the Wheeling & Lake Erie Rail-

way Company, Erie Railroad Company, and Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and that notice of this order be given to the general public by depositing a copy thereof in the office of the Secretary of the Commission in Washington, D. C.

By the Commission, division 6.

GEORGE B. MCGINTY,

(Seal) *Secretary.*

FILE COPY

APR 14 1930

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 680.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

REPLY BRIEF ON BEHALF OF APPELLANT.

C. F. TAPLIN,
H. H. HOPPE,
Solicitors for Appellant.

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Cleveland, Ohio,
Of Counsel.

THE GOTCH LEGAL PUBLISHING CO., CLEVELAND, O.

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REPLY BRIEF ON BEHALF OF APPELLANT.

I.

THE REPORT AND FINDINGS OF THE COMMISSION ARE WITHOUT WARRANT IN LAW AND CONTRARY TO LAW AND ARE ARBITRARY.

In Wheeling's brief (pp. 11 to 13) and in the brief on behalf of the United States and the Interstate Commerce Commission (pp. 15 to 18), numerous authorities are cited to the effect that if the Commission's finding is supported by substantial evidence the same is conclusive unless there is some irregularity in the proceedings or some error in the application of the rules of law. With these authorities counsel for appellant agrees, but they are not applicable to the instant case.

In the case at bar and in answer to appellant's contention that Terminals is a common carrier and that as such it cannot discriminate in its rates, fares and charges or grant rebates, the Commission found and determined that as a matter of law and under Paragraph 4 of Section 3 of

Title 49 U. S. C., Wheeling and Terminals having agreed upon the terms of Wheeling's use, it was without jurisdiction in the premises. Thus the Commission said (R. 51):

> "It is clearly apparent that the contract is favorable to the applicant, yet the protestant, as a minority stockholder of the applicant, appears in the unusual position of objecting to that contract on the ground that it is favorable. On brief, protestant quotes various excerpts from the interstate commerce act as showing our jurisdiction over the Terminals Company, the illegality of carriers according undue or unreasonable preference or advantage, etc. But paragraph (4) of section 3 of the act, quoted by the protestant, under which we are authorized to require a carrier owning terminal facilities to permit the use thereof by another carrier or carriers, provides that such use shall be accorded '*on such terms and for such compensation as the carriers affected may agree upon,* or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required to be ascertained on the principle controlling compensation in condemnation proceedings.' *In the present case the carriers have agreed upon the consideration to be paid, and each of the prospective cotenants of the applicant has formally approved that agreement.*" (Italics ours.)

This, it is the contention of the appellant, was error as a matter of law and because the Commission found that Terminals and Wheeling had a right to agree upon the terms for Wheeling's use of the union depot facilities it ignored the testimony offered with respect thereto, showing beyond question that the user contract is illegal because it does provide for an undue and unjust preference and discrimination and a rebate. With respect to the price at which Wheeling should dispose of its passenger station the Commission said (R. 53):

> "In view of the plain wording of the statute we are of the opinion that on the facts shown by this record we are without jurisdiction to prescribe the price

at which the applicant in these proceedings must dispose of its properties after abandonment."

And because the Commission found that it was without jurisdiction to prescribe the price, it again ignored the testimony offered with respect thereto and failed and refused to make any finding thereon. In so doing, it is submitted that the Commission's findings are contrary to law and are arbitrary because they ignored the testimony offered.

Counsel for Wheeling in their brief, on page 65, say:

"We submit that it has been sufficiently shown heretofore that Wheeling's user contract is not unjustly discriminatory, or unduly or unreasonably preferential. Obviously, the Commission has no jurisdiction to strike down a contract merely because it is otherwise favorable.

"Nor could it do so upon the theory that the user contract and the option contract (Exhibit 11) for the sale of Wheeling's lands to The Cleveland Terminals Building Company were interdependent. The uncontradicted testimony of Mr. Duncan (R. 291) is that the consideration for the sale of the land and the compensation for Wheeling's use of the union depot were arrived at independently of each other. A contrary finding by the Commission would have been arbitrary, as opposed to the uncontradicted evidence."

This is clearly an admission that the opinion of the District Court is arbitrary and contrary to the uncontradicted testimony, for the District Court found that that which Wheeling proposes to do is fair and in the public interest *only* when the user contract and the option to sell are considered as one and the considerations therein expressed as single. (R. 494) And while counsel for Wheeling admit that any consideration of the user contract and the option to sell as being interdependent would be arbitrary and contrary to the uncontradicted testimony, counsel for

the United States and the Interstate Commerce Commission, on page 23 of their brief, attempt to argue that the Commission, just as the District Court, recognized that there were *considerations* passing from Wheeling to Terminals *other* than the cash payment of $20,000 specified in the user contract. The difficulty encountered by both counsel for the United States, the Interstate Commerce Commission and Wheeling in attempting to uphold the report and findings and certificates of the Interstate Commerce Commission is thus obvious and arises from their desire to argue that the Commission did something which it did not do. The fact is, as appellant contends, that the Interstate Commerce Commission, by reason of Paragraph 4 of Section 3 and its previous finding in *Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company,* 104 I. C. C. 203, found and determined that it was without power to specify the terms of Wheeling's use of Terminals' facilities so long as the parties themselves had agreed thereto. And because the Commission so found it made no finding whatsoever as to whether or not the rate specified in the user contract was unjustly preferential or discriminatory, and thus entirely ignored the testimony offered with respect thereto. In the course of its report and findings the Commission stated that the user contract was favorable to Wheeling (R. 51) and that the evidence submitted by Terminals tended to show that the proposed rental approximated the out-of-pocket cost to it of furnishing its facilities and service to Wheeling. (R. 50) If such statements of the Commission, made after a finding that the Commission was without power to specify the terms of such use because the parties had agreed thereon, can in any wise be construed to mean that the Commission passed upon the preferential or non-preferential character of the rate specified in the user contract, they certainly cannot be construed as going any further

than to say that the terms specified therein approximate *the out-of-pocket cost* of furnishing the services therein agreed to be furnished. And such finding is clearly contrary to law, for if, as appellant contends, Terminals must furnish its service to all upon the same basis for the same or similar services rendered, then a rate which but approximates the out-of-pocket cost is clearly unjustly preferential and discriminatory.

II.

TERMINALS IS A COMMON CARRIER.

It is significant to note that neither counsel for the United States, the Interstate Commerce Commission nor Terminals deny in their respective briefs that Terminals is a common carrier subject to the Interstate Commerce Act. Wheeling alone attempts to establish the fact that Terminals is not a common carrier subject to the Interstate Commerce Act, and in so doing, it is submitted, counsel for Wheeling failed to fairly analyze the situation.

As pointed out by appellant in its main brief (pp. 36 and 37), the term "common carrier" is not defined in the Interstate Commerce Act and we must consequently resort to the common law definition thereof. If Terminals is a common carrier at common law, we must then ascertain whether it is engaged in the transportation of persons and property wholly by railroad in interstate commerce. For if it is a common carrier at common law and is engaged in the transportation of passengers and property by railroad in interstate commerce as those terms are used in Section 1 of the Interstate Commerce Act, then Terminals is subject to the provisions of the Act.

It is admitted by counsel for Wheeling that Terminals is organized under Chapter 1 of Subdivision II of Title IX of the General Code of Ohio, Subdivision II being entitled *"Public Service Corporations Other Than Rail-*

roads," Chapter 1 being entitled *"Union Depots."* Terminals is thus organized as a *public service corporation.* Under its articles of incorporation (Exhibit 68) it is organized for the purpose of "constructing and maintaining a *common* or *union station house* * * * *for the use of steam railroads or both steam and electric railroads."* In the initiated ordinance of the City of Cleveland (Exhibit 110), which was initiated by Van Sweringens and Terminals, it has professed to serve all the various steam and electric lines entering the City of Cleveland, and in Section 91-3 of the initiated ordinance Terminals is required to open its facilities to *any* and *all steam, interurban and suburban railroads which may choose to use the same.* In its answer filed herein (Paragraph 17, R. 88) Terminals admits that it has exercised the sovereign power of eminent domain. The services that it proposes to render are to be rendered for hire. Under such circumstances there can be no question but what it is a common carrier at common law. It is a railroad within the meaning of the Interstate Commerce Act, for it owns and will operate a terminal facility, and Paragraph 3 of Section 1 expressly defines as a railroad the owner and operator of terminals and terminal facilities. It will be engaged in transportation as used in the Interstate Commerce Act, for it will operate locomotives, manned by its own crews, to transport trains, passengers, baggage, express and milk.

On page 22 of their brief counsel for Wheeling say:

> "The conception of Terminals as a common carrier prospers only when it is at large in the realm of generalities. It cannot be reduced to the concrete. All the difficulties inherent in it are disclosed by the question, 'Carrier of what?'
>
> "The Interstate Commerce Act deals with two kinds of common carriers by railroad—i.e. carriers of passengers and carriers of property."

An attempt is then made to show that Terminals will not carry either passengers or property.

The Interstate Commerce Act, however, does not alone deal with "carriers of passengers or property," but it applies to "common carriers engaged in the *transportation* of passengers and property." (Section 1, Title 49, U. S. C. Italics ours.) The record shows, and it is an admitted fact, that Terminals will own and operate twenty-two electric locomotives which will be manned and operated by its own crews and which will be used by Terminals, and not by any railroad using its facilities, to transport and carry into and out of its depot and over the approaches thereto and over Terminals' tracks and right of way the passenger trains, baggage, express and milk cars of those railroads which choose to use its facilities. It is factitious to say that in so doing Terminals is not carrying or transporting the passengers, baggage, milk and express shipments aboard such trains and cars.

On page 22 of their brief counsel for Wheeling attempt to argue that there is no contractual relation between Terminals and the passengers it will transport and carry and that if a passenger aboard a train should be injured while being transported by Terminals' locomotive no action *ex contractu* could be maintained by the injured passenger against Terminals. But this is clearly an erroneous conclusion. In the first place, the contract which Terminals makes with any carrier choosing to use its facilities is a contract by which Terminals assumes to perform a part of the contract of that carrier made with its passengers at the time of selling them their tickets, an obligation which required Terminals to safely transport those passengers for a certain given distance over certain tracks of Terminals and into and out of its depot. Secondly, the contract so made with any carrier is a contract for the benefit of the passengers that Terminals carries and transports into and

out of its depot. So that any passenger injured while being transported by one of Terminals' employes can maintain an action *ex contractu* against Terminals, either upon the basis of an assumption of a contractual obligation or upon the basis of a contract made for the benefit of a third party.

In an attempt to show that Terminals is not a common carrier counsel for Wheeling directs our attention to the cases of *United States ex rel. Refrigerator Co. v. The Interstate Commerce Commission*, 265 U. S. 292, and *Ellis v. The Interstate Commerce Commission*, 237 U. S. 434. In both of these cases the companies which it was sought to classify as common carriers under the Interstate Commerce Act were engaged simply in the manufacture and maintenance of refrigerator cars, tank cars and box cars which they rented either to railroads or shippers. In neither case was there anything in the articles of incorporation of the company with respect to any operation by it as a common carrier. In neither case did the company operate or control the railroads or operate or control the cars so let and leased to the railroads. The cars were operated and controlled by the railroad companies which hired them. There is indeed a marked differentiation between those cases and the case at bar, in that in the case at bar Terminals has in its articles of incorporation professed to serve all, and Terminals not only owns electric locomotives but actually operates and controls them and the trains and cars and passengers which it transports.

Counsel for Wheeling further calls our attention to the *Express* cases, 117 U. S. 1, in which this Court held that railroads were not common carriers for express companies. The case is really one in favor of the appellant's contention, for in the course of the court's opinion Mr. Chief Justice Waite said, on page 21:

> "But is it neither averred in the bills nor shown by the testimony that any railroad company in the United States has ever held itself out as a common carrier of express companies; that is to say, as a common carrier of common carriers."

This language clearly implies that if a railroad company did profess to serve any and all express companies which may choose to use its facilities, in such an event such railroad would be "a common carrier of common carriers." In the case at bar it is so alleged in the amended bill of complaint (R. 8) and Terminals has professed to serve with terminal facilities any and all steam and electric railroads now or hereafter entering the City of Cleveland.

Counsel for Wheeling further calls our attention to the case of *Central Railroad & Banking Co. v. Lampley,* 76 Ala. 357, in which the plaintiff, who had sent a package of money by registered mail, sought to recover from the railroad company for its loss. While evidence was offered tending to show that the package containing the money was not in the mail pouch when the mail pouch reached its destination, no evidence was offered to show that it had been appropriated by the railroad company or that it had been lost or stolen by any negligent act or omission of the railroad, the plaintiff attempting to rest its case on the mere fact that the money had been delivered to the railroad company at Clayton and that it had not been surrendered to the post master at point of destination. The plaintiff contended that because the defendant was a common carrier the mere failure to deliver fixed its liability. Of course the conclusive answer to such a situation is that no one can be a common carrier of mails, for the government reserves that privilege.

It is further contended by counsel for Wheeling that Terminals is a mere instrumentality or agency by and through which Central, Big Four and Nickel Plate have

delegated by private contract the performance of part of the duty which they owe to the public, and in support of this contention counsel calls attention to the case of *Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Association*, 247 U. S. 490, decided June 10, 1918. The conclusive answer to this argument seems to be found in the Transportation Act of 1920 which was not in force when this case was decided. The Transportation Act of 1920 expressly declares that the owner and operator of such facilities—instrumentalities or agencies, if you please—such as Terminals owns and proposes to operate are made subject to the Interstate Commerce Act and to regulation by the Interstate Commerce Commission. (Paragraph 3, Section 1, Title 49, U. S. C.) And even though such were not true and while there might possibly be some merit to the contention of Wheeling's counsel, if the instrumentalities or agencies so adopted were for the exclusive use of the carriers adopting them, certainly Terminals could not be considered as such, for it has undertaken to provide terminal facilities for all those steam and electric railroads which now or at any time hereafter may enter the City of Cleveland. As such Terminals cannot be the instrumentality or agency of a chosen few.

Again, the case of *Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Association, supra*, is not in point. There two railroad companies owning and controlling a terminal railroad company sought to exact through the terminal railroad company one dollar per car more from shippers located on the line of the terminal railroad company than was exacted from shippers located on their own lines. The Commission of Minnesota held that such practice was an unjust discrimination and ordered that the two railroad companies extend to shippers located on the lines of the terminal railroad company the same treatment which they extended to shippers located on

their own lines. Upon error being prosecuted to this Court from the Supreme Court of the State of Minnesota, the finding of the Commission of Minnesota was affirmed by this Court, and indeed for very obvious reasons. If the practice which the two railroads companies sought to follow in Minnesota were permissible, the railroads of the country could divide their lines of railroad into a number of subsidiary companies and thus exact different fares, rates and charges from shippers located on the line of one subsidiary than would be exacted from shippers located on the line of another subsidiary. One cannot use the corporate fiction for the purpose of so evading the law. In the case at bar Terminals does not purport to exact any rates, fares or charges direct from passengers or shippers, but is to be paid for the passengers, baggage and express which it carries and transports by the different railroad companies which choose to use its facilities, and it has professed to serve all railroads which choose to employ it for that purpose.

On pages 30 and 31 of their brief counsel for Wheeling attempt to set forth the difference in service to be rendered Wheeling by Terminals from that which is to be rendered by Terminals to the proprietary lines. Counsel for Wheeling then say:

> "It seems therefore that Terminals' services are to be rendered to different carriers each of whom requires a different amount of service and between whose businesses there are wide generic differences. It seems to us that the term 'common carrier' necessarily implies a person who is serving a group or groups of people requiring the same kind of service of the same or readily commeasurable quantity. The conception breaks down as applied to a person rendering service to a group of patrons each of whom requires a service different in kind and quantity from that furnished to others and incapable of comparison with reasonable precision."

The kind of service to be rendered by Terminals to those who choose to use its facilities is exactly the same. Terminals is going to furnish depot facilities to all who choose to use them and it is going to transport trains, passengers and baggage in and out of its own union depot and over its easterly and westerly approaches, or at least parts thereof. The quantity of service might be different but that it is readily commeasurable is shown by the testimony of Mr. Jouett, Terminals' own engineer, who attempted to establish that the rental of $20,000 per year specified in the user contract with Wheeling was slightly in excess of the out-of-pocket cost. If the quantity of service were not commeasurable, Mr. Jouett could not have given such testimony. Thus taking the definition which counsel for Wheeling attempts to apply to the term "common carrier," we see that it is a common carrier.

On page 35 of the brief of counsel for Wheeling it is argued in substance that too much stress cannot be laid on the provisions of the initiated ordinance No. 47,814 requiring Terminals to serve all steam and electric railroads entering the City of Cleveland, for the reason that the union depot and approaches which Terminals desired to build necessitated the vacation of some streets and the relocation of others, all of which required the consent of the City, and this put the City in a position to impose upon Terminals obligations which would not otherwise have existed. But it is admitted in the pleadings that Terminals itself initiated this ordinance and it isn't to be presumed that it intiated something which it did not desire to do. Moreover, there was no obligation upon the part of Terminals to accept this ordinance after it was initiated and passed by the City Council and the electors of the City of Cleveland. Its acceptance was its own free voluntary act and deed.

The fact that the ordinance requires Terminals to permit all carriers desiring to use its facilities "upon such terms and conditions and for such consideration as shall be mutually agreed upon," with a provision for arbitration if they cannot agree, and the fact that the union passenger terminal agreement (Exhibit 69), provides that Terminals shall have the right to admit other steam railroads upon such terms and conditions as may be agreed upon, is no criterion. A public service corporation, such as Terminals is, cannot profess to serve any and all upon such terms as may be agreed upon but, having by its profession devoted its property to public use, it must afford an equality of treatment. It wasn't necessary for Terminals to devote its property to a public use or to profess to serve all who choose to employ it, but it voluntarily did so, it exercised the power of eminent domain to be in a position so it could do so, and it has thereby subjected itself to public regulation.

The charge made by counsel for Wheeling in its brief on page 29, that appellant's contention that Terminals is a common carrier is an afterthought and one which was not raised until the adjourned hearings beginning May 13, 1929, is an untruthful assertion of the fact. At the hearing had in January of 1929 Examiner T. F. Sullivan refused to admit testimony in this regard, and in the petition filed by appellant on February 9, 1929 for a review of the rulings of Examiner Sullivan it was alleged that the Examiner had erred in excluding this and other testimony. By reason of the fact that the Commission subsequently sustained the petition of the appellant and ordered the Examiner to receive this and other testimony, all of which is in the record, the petition of the appellant to review the rulings of the Examiner was not included in the record, it being considered immaterial as the testimony was subsequently heard.

It is respectfully submitted therefore that Terminals is a common carrier subject to regulation by the Interstate Commerce Commission.

III.

TERMINALS IS REQUIRED TO FILE TARIFFS.

In answer to the contention of the appellant that Terminals must file tariffs, counsel for Wheeling (p. 38 *et seq.*) and counsel for the Government (pp. 27 and 28) call attention to the provisions of Paragraph 1 of Section 6, which requires the filing of tariffs and the printing and keeping open to public inspection schedules showing all rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, which schedules shall plainly state the places between which property and passengers will be carried. And counsel for Wheeling contend that Terminals is not operating a route for the movement of passengers or property and that there are no points between which it assumes to transport passengers or property. Counsel for the Government, on the other hand, say that it is apparent that the rates, fares and charges referred to are those which are charged to the public because the public is interested only in charges which are exacted from it. But Terminals will maintain a route for the movement of passengers and property, its route being from any point on its easterly approach into and through the station and out over its westerly approach and vice versa. Between the same points it will, by means of its own locomotives controlled by its own crews, transport passengers and property. The public is indeed interested in knowing what charges are to be exacted therefor because such charges will be passed on to the travelling public. There is therefore no disability found in Paragraph 1 of Section 6, Title 49 of the Interstate Commerce Act.

And that the public has an interest in any and all charges for any service rendered or to be rendered for the transportation of passengers and property is readily disclosed by the provisions of Paragraphs 4 and 5 of Section 1 of Title 49, U. S. C., wherein the Commission is expressly given jurisdiction over the rates and charges as between carriers themselves and the proper divisions thereof and any and all charges made for any service rendered. These paragraphs of Section 1 read as follows:

> "(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."
>
> "(5) *Just and reasonable charges required; classification of messages, and rates; exchange of services.* All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The *Chicago Junction Case*, 264 U. S. 258, *Pennsylvania Company v. United States*, 236 U. S. 351, and *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 382,

referred to in appellant's main brief, clearly support this contention. In fact the quotation from *United States v. Terminal Railroad Association of St. Louis,* set forth on page 44 of brief of counsel for Wheeling, clearly supports appellant's position. The court said (224 U. S. 383 at 405):

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common *but exclusive use.* In such cases other companies might be admitted upon terms or excluded altogether." (Italics ours)

This language clearly implies that if independent railroad companies combine for the purpose of controlling or acquiring a terminal company, *not for their common and exclusive use,* but for the use of any and all railroads which seek to use those facilities, then such companies so combining could not exclude others who sought to use the terminal facilities. The court went on further to say:

> "If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The 'physical or topographical condition peculiar to the locality,' which is advanced as a price justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the *impartial agent of all who,* owing to conditions, are under such compulsion, as here exists, to use its facilities." (Italics ours.)

There are no physical or topographical conditions in Cleveland which prevent any carrier from maintaining its own terminal, such as there were in St. Louis, and there consequently is no necessity from that point of view in declaring Terminals the impartial agent of all who, owing to

such topographical conditions, are under compulsion to use its facilities. If there were, the situation would indeed be far easier for the Court than it was in the *St. Louis Terminal* case, for in this case Terminals has professed to serve all, and certainly in so doing it must serve, as this Court said in the *St. Louis Terminal* case, by permitting other carriers to use its facilities upon "such just and reasonable terms and regulations as will in respect of the use, character and cost of service place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." In other words, Terminals cannot discriminate in its rates, charges or fares and cannot grant rebates.

IV.

THE RENTAL SPECIFIED IN THE USER CONTRACT IS SUBJECT TO CHANGE.

Counsel for Wheeling in its brief, on page 46, say:

"It is submitted that the contentions of appellant under Point II of its brief contradict and defeat its argument under Point I. Briefly stated, appellant's argument under Point II is that paragraph (4) of Section 3 of Title 49, U. S. C., is not applicable because the carrier owning or entitled to the enjoyment of terminal facilities therein referred to is not the same sort of carrier as Terminals. Here appellant seeks to escape from the logic of its previous argument (Point I) to the effect that as Terminals is a carrier, and as the provisions of the Interstate Commerce Act require all carriers to publish and file tariffs and conform thereto, Terminals must file and conform to such tariffs. Here it contends that the term 'carrier,' as used in Section 3 (4), does not apply to Terminals. Appellant should not be permitted to blow hot and cold upon this proposition."

Appellant made no argument and does not contend that the word "carrier" as used in Paragraph 4 of Section 3 of Title 49 is any different from the term "carrier" as used in any other portion of the Interstate Commerce Act. Paragraph 4 of Section 3 deals primarily with terminals and terminal facilities, and the position of appellant is that the terminal being constructed by Terminals is not the kind of a terminal referred to in Paragraph 4 of Section 3. The terminal facility referred to in Paragraph 4 of Section 3 is the same kind of a terminal facility to which this Court referred in the case of *United States v. Terminal Railroad Association of St. Louis,* wherein this Court said:

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but *exclusive use. In such cases other companies might be admitted upon terms or excluded altogether.* If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals." (Italics ours.)

This was in 1912. But since 1920, when Paragraph 4 of Section 3 became effective, there not only remains to such excluded carriers the right to construct their own terminals but there is also the right to apply to the Interstate Commerce Commission for an order fixing the terms upon which they can use the terminal from which they are excluded. As the late Chief Justice said in *Railroad Commission of California v. Southern Pacific Railroad Company,* 264 U. S. 331 at page 343:

> "It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier a union station or depot."

This language clearly implies that Paragraph 4 of Section 3 and the power therein conferred upon the Interstate

Commerce Commission is wholly unnecessary if you are dealing with a union station or depot. And as pointed out heretofore, Terminals is not building a depot for the common but exclusive use of two or more railroads, but is building a terminal for the use of all steam and electric railroads entering the City of Cleveland which desire to use the same. It is this fact that distinguishes it from a terminal such as is referred to in Paragraph 4 of Section 3.

The construction placed upon Paragraph 4 of Section 3 by the Interstate Commerce Commission, not only in this case, but in the cases of *Chicago & Alton Railroad Company v. Toledo, Peoria & Western Railway Company*, 146 I. C. C. 171, and *Missouri-Kansas-Texas R. R. Co. v. K. C. T. Ry. Co.*, 104 I. C. C. 203, is, it is submitted, clearly erroneous. The dissenting opinion of Commissioner Eastman in the latter case (104 I. C. C. at 231) is, it is submitted, the more logical and the better supported in reasoning.

In the brief of counsel for the United States and the Interstate Commerce Commission (p. 23) it is stated:

> "The Commission by reference to its decision in *M-K-T R. Co. v. K. C. T. Ry.*, 104 I. C. C. 203, clearly indicates its view that as between Wheeling and the proprietary carriers (stockholders of Terminals) there was an utter absence of the like circumstances and conditions upon which a finding of unjust discrimination or undue preference could be predicated."

Certainly, however, the Commission's report and finding is susceptible of no such construction. The question presented in the case referred to was a question as to whether or not the Interstate Commerce Commission had jurisdiction to change the rental specified in a user contract between a terminal company and one of its tenant lines. In that case the Commission held that by reason of Paragraph 4 of Section 3, the carriers having agreed upon terms, the Commission was without power to modify or

change them. And that, it is submitted, was the holding of the Commission in the case at bar, a holding which, it is further submitted, is clearly erroneous.

Counsel for the United States and the Interstate Commerce Commission further argue in their brief (p. 23) that the Commission recognized that there were considerations passing from Wheeling to Terminals other than its annual cash payment of $20,000, making the situation occupied by Wheeling unique, that is, not only differentiating it from the proprietary carriers but also from any possible future carrier tenant. As pointed out by counsel for appellant in its main brief filed herein (p. 74, *et seq.*), such a finding is not only contrary to the undisputed testimony but is likewise contrary to all legal precedents upon the subject. Carriers are required to collect their rates and charges from all alike in cash and they may not accept services, advertising, property or a release of claims for damages in payment for transportation.

Counsel for the United States and the Interstate Commerce Commission and counsel for Wheeling further state in their briefs that the appellant fails to point to any one who could complain of the rental charged Wheeling by Terminals. This point is amply covered in appellant's brief in chief on page 81, *et seq.*, and will not be repeated here. Suffice it to say that, as soon as Terminals is pronounced to be a common carrier for hire and one which must furnish the use of its facilities to all on the same basis for services rendered, Terminals who does not now deny but what it is such a common carrier will force Wheeling to give up the unjust unfair terms as specified in the contract and will force Wheeling to pay a non-discriminatory non-preferential rate for the service which it is to receive.

V.

THE RATE SPECIFIED IN THE USER CONTRACT IS UNDULY AND UNREASONABLY PREFERENTIAL AND DISCRIMINATORY, AND THE USER CONTRACT DOES PROVIDE FOR A REBATE.

It is of course true as contended by counsel for the United States and the Interstate Commerce Commission and counsel for Wheeling that it is not every discrimination and preference which is illegal. The preference and discrimination must be unjust and unreasonable. In an effort to show that it is not unjust and unreasonable counsel for Wheeling, on pages 55 to 60 of its brief, argue generalities. When these generalities are reduced to a dollar and cent basis, and based upon the undisputed testimony in the record, there is no one who can doubt for one moment but what the rate specified in the user contract is unjustly preferential and discriminatory. Appellant clearly demonstrated this in its brief on pages 64 to 66. The following may be taken as a further illustration of the unjust and unreasonable discrimination and preference found in the user contract under consideration. Terminals in its intervening petition before the Interstate Commerce Commission (R. 210) says that its passenger terminal will cost when completed $88,000,000. A return upon $88,000,000 at 5% is $4,400,000 per annum. Taxes upon 60% of $88,000,000 at the prevailing tax rate in the City of Cleveland, Cuyahoga County, or 2½%, amount to $1,320,000, or a total of fixed charges for return upon the investment and taxes *alone* of $5,720,000. If Wheeling's proper proportion were only 1% it would be required to pay for interest and taxes *alone* the sum of $57,200. If we add to that what Mr. Jouett says is the actual operating cost of bringing Wheeling's trains into and out of the station, or $19,110, we get a total annual charge to Wheeling of $76,210. If Wheeling's proper proportion of in-

terest and taxes *alone* were only one-half of 1% and we add what Mr. Jouett says is the cost of operating Wheeling's trains into and out of the station, we have an annual charge of $47,710, and this, if the Court please, in the face of the admission of all the parties hereto that Wheeling cannot afford to pay more than $20,000 per annum. The argument of counsel for Wheeling, dealing as it does in generalities, is based *upon an out-of-pocket cost estimate* which includes absolutely no proportion of Terminals' fixed charges. No one ever heard of a shipper receiving from a carrier a rate equal to out-of-pocket cost. Moreover, the out-of-pocket cost testified to by Mr. Jouett is clearly less than the actual cost to Terminals of rendering the service, as is apparent from appellant's brief in chief on pages 63 and 64.

Furthermore, an examination of the user contract in question discloses that it is upon its face unjustly and unreasonably discriminatory for it provides (R. 125) that Wheeling's trains may include cars from points of origin or to points of destination on extensions of or on lines connecting with the present lines of Wheeling, which cars handled into or through the passenger terminal shall be paid for upon the same per car basis from time to time as the cars handled into or through the passenger terminal for the account of the proprietary railroad companies. This provision of the contract means just what it says and the effect thereof is that any connecting carrier, of which the appellant is one, who desires to send a car into the union depot of Terminals via the lines of Wheeling must pay therefor the same rate per car as Central, Nickel Plate and Big Four, or about $35.32, as compared with what Wheeling will pay for a similar car receiving identically the same service, or $1.43 per car.

Counsel for Wheeling in its brief on page 61 say that the Transportation Act of 1920 *would seem* to permit the

Commission to authorize the user contract even if its terms were unduly preferential to Wheeling as compared to other tenants of Terminals, and they cite in support thereof *Dayton-Goose Creek Railway Co. v. United States*, 263 U. S. 456, and *New England Divisions* case, 261 U. S. 184.

The conclusive answer to this contention is that the Commission did not authorize the unjustly preferential and discriminatory rate provided for in the user contract but said that by reason of Paragraph 4 of Section 3 it had no power to modify the same. Moreover, the *Dayton-Goose Creek Railway Company* case and the *New England Divisions* case are cases which deal with the re-capture clause of the Transportation Act and the division of joint rates. That they do not apply to any particular rate is shown by the opinion of this Court in the *Dayton-Goose Creek Railway Company* case, in which the late Chief Justice said (263 U. S. 480):

> "It should be noted that, in reaching a conclusion upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of §15a makes this clear:
>
> " 'The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.'

"This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit,—a circumstance that was never relevant in such an inquiry, as hereafter shown."

It is further contended by counsel for the United States and the Interstate Commerce Commission and counsel for Wheeling that the Commission in issuing its certificates of public convenience and necessity approved the user contract here in question and conclusively rejected appellant's claim that it is unjustly discriminatory or unduly and unreasonably preferential. An examination, however, of the report and findings of the Commission discloses that it issued its certificates of public convenience and necessity, not because it rejected the claim of appellant that the user contract was unjustly discriminatory or unreasonably preferential, but because it found that under Paragraph 4 of Section 3 it was without power over the rate specified in the user contract, the parties having agreed thereto. The error of this finding has been discussed *supra*.

The contention of counsel for Wheeling that the $200,000 rebate specified in the user contract (R. 127) is clearly nothing more than an agreement for liquidated damages in the event that the user contract is not performed by Terminals to Wheeling's satisfaction is again factitious. It is no protection to Wheeling or its patrons in the event that Wheeling is permitted to do that which it seeks to do, for it is an illegal agreement and one upon which Wheeling could not collect, and if Wheeling should withdraw from the passenger station of Terminals it could find no available site in the City of Cleveland as accessible for its patrons as the site which it now seeks to abandon.

VI.

THE ACTION PROPOSED TO BE TAKEN BY WHEELING IS CONTRARY TO THE CLAYTON ACT AND SECTION 8683 OF THE GENERAL CODE OF OHIO.

Counsel for Wheeling in their brief, on page 66, state that there is no evidence in the record that the purchases of Wheeling's stock by Central, Nickel Plate and B. & O. were in violation of the Clayton Act or Section 8683 of the General Code of Ohio. Appellant offered and there were received in evidence Exhibits 94, 95 and 96, being the Clayton Act complaints filed by the Commission against Central, Nickel Plate and B. & O. for their acquisition of Wheeling's stock. Appellant further offered in evidence as Exhibit 97 the report and finding of the Commission, ordering the carriers to divest themselves of Wheeling's stock because it was acquired in violation of the Clayton Act. Certainly then the record shows that the stock was acquired contrary to the Clayton Act.

It is alleged in the amended bill of complaint that such stock was acquired in violation of the Clayton Act and that an order of divestiture was subsequently made, all of which is admitted in the answers of Wheeling and Terminals.

Counsel for Wheeling further argue, on pages 67 and 68 of their brief, that the order of the Commission ordering a divestiture is not *res adjudicata*. It is alleged in the amended bill of complaint (R. 25) that the order of divestiture was entered on March 11, 1929, ordering B. & O., Central and Nickel Plate to divest themselves of Wheeling's stock within ninety days from such date; that on June 10, 1929, (R. 26) such time was extended for a period of thirty days, and that on the 10th day of July it was again extended for a period of thirty days; that on July 30, 1929 such order was fully complied with. These allegations are admitted in the answer of Wheeling and the joint answer

of Terminals and Building. (R. 80, 93) So that there can be no question but what the order is *res adjudicata.* The complaint of appellant is that between May 17, 1928, when Clayton Act complaints were filed (Exhibits 94, 95 and 96), and March 11, 1929, when the order of divestiture was made (Exhibit 97) the action herein complained of was authorized by directors elected by means of such illegally acquired stock, and that by reason of the doctrine announced by this Court in *Federal Trade Commission v. Western Meat Co.,* 272 U. S. 554, the Commission did have jurisdiction to set aside such acts as being in furtherance of the conspiracy for which B. & O., Central and Nickel Plate acquired Wheeling's stock, the effect of which is to substantially lessen competition.

It is further contended by counsel for Wheeling that this Court cannot give any effect to the orders of divestiture by reason of the fact that jurisdiction to enforce orders of divestiture is vested in the Circuit Court of Appeals. But we are not seeking here to enforce any order of divestiture. It has been complied with. Appellant was seeking before the Commission, in which jurisdiction is vested by the statutes to enforce the Clayton Act, to have it set aside the action taken by directors selected pursuant to what the Commission itself found was an illegal acquisition of stock, and to have it withhold its certificates of public convenience and necessity authorizing that to be done which it is proposed be done pursuant to such illegal authorization because the effect thereof is to substantially lessen competition. Notwithstanding the doctrine announced by this Court in *Federal Trade Commission v. Western Meat Co., supra,* the Commission said that it was without jurisdiction so to do. And while the Circuit Court of Appeals for the Sixth Circuit, Judges Dennison, Hickenlooper and Moorman sitting, in the case of *The Wheeling & Lake Erie Railway Company v. The Pittsburgh & West Virginia Rail-*

way Company, 33 Fed. 2nd. 390, wherein this appellant contended, among other things, that a temporary contract which had never been submitted to the Commission should be enjoined upon the ground, among others, that it was authorized by directors illegally elected to office by stock acquired contrary to the Clayton Act, the Court there said that the sole jurisdiction to enforce the Clayton Act was vested in the Interstate Commerce Commission. In the case at bar, heard in the District Court with two of the same Judges, to-wit, Judges Dennison and Hickenlooper, sitting, appellant presented and argued that the Commission in this case, in saying that it had no jurisdiction to set aside that which Wheeling proposes to do because it was authorized by directors elected by stock acquired contrary to the Clayton Act, had committed error and yet, as is shown by their opinion, they ignored the question entirely.

It is not and never has been the contention of appellant that all acts authorized and performed by directors elected by stock illegally acquired are illegal, but appellant does contend that those acts authorized to be done or performed pursuant to the very illegal purpose for which they acquired stock control are illegal, and that such is true, not only under the Clayton Act, but under Section 8683 of the General Code of Ohio, is shown by the authorities and decisions of this Court and those of the Supreme Court of Ohio. *Federal Trade Commission v. Western Meat Co.,* 272 U. S. 554; *Pollitz v. Public Utilities Commission,* 96 O. S. 49; *Mannington v. Hocking Valley R. R. Co.,* 183 Fed. 133.

Counsel for Wheeling on page 69 of their brief say:

> "Common justice to Wheeling and such of its stockholders as have not been breaking the Clayton Act would seem to require at least as favorable a judicial attitude towards its acts which do not in themselves contribute to any illegal result."

By reference to the annual stockholders' meetings of May 1927 (Exhibit 88) and May 1928 (Exhibit 91) and by reference to Exhibits 90 and 92, which show how the stock was voted at the May 1927 and May 1928 annual meetings, your Honors will observe that substantially the only stock voted in favor of the directors who have authorized that to be done and which is herein complained of, was the stock of Central, B. & O., Nickel Plate and the directors whom they elected. By reference to the same Exhibits your Honors will observe that the appellant and other shareholders representing in all a majority of the preferred and common stock of the company protested the right of Central, B. & O., and Nickel Plate to vote, but without avail. By reference to the minutes of the directors' meetings of July 11th (Exhibit 45), July 20th (Exhibit 46), and November 23rd (Exhibit 47), your Honors will further observe that the action herein complained of was authorized solely and alone by directors elected by such iliegally acquired stock and over the protest of directors elected by appellant and other shareholders representing a majority of the preferred and common stock of the company. "Common justice" then, to use the term of Wheeling's counsel, is all that appellant seeks here to invoke for the protection of those shareholders who have not been breaking the Clayton Act and who have in no wise contributed to the illegal authorization of that which it is proposed here to do. It makes no difference that Central and Nickel Plate do not compete with Wheeling for passenger traffic. The findings of the Commission and the pleadings in this case are to the effect that they are competitors for freight traffic and it makes no difference to Central and Nickel Plate how it lessens competition, whether by placing a burden upon Wheeling's freight carrying ability to support Wheeling's use of Terminals' station or in any other way.

It is not a new kind of conspiracy to ruin a competitor in which the first steps of the conspirators is to heavily invest in the stock of the proposed victim. This Court knows that in times past millions have been spent time and time again and then scrapped for the purpose of suppressing or destroying competition.

The contention of counsel for the United States and the Interstate Commerce Commission and the contention of counsel for Wheeling that appellant is attempting in this case to try the title to office of directors whose *de facto* status is admitted is an argument made for the purpose of confusing the issue. Appellant is not seeking to try their title to the offices which they occupy but is seeking to prevent the accomplishment of an illegal act, for the accomplishment of which it is not denied, in any of the briefs, that Central, B. & O. and Nickel Plate acquired stock control of Wheeling.

VII.

THE ACTION PROPOSED TO BE TAKEN REQUIRES STOCKHOLDERS' CONSENT BECAUSE

(a) It provides for a change in Wheeling's termini.

In an effort to escape the provisions of Section 8747 of the General Code of Ohio, in which it is provided that with the consent of three-fourths in interest of its stockholders a railroad company may change the line or any part thereof and either of its proposed termini and that no change should be made which will involve the abandonment of any part of the road either partly or completely constructed, counsel for Wheeling attempt to argue that the change of termini therein referred to is one by which the terminus of the railroad is moved from one community to another, thereby depriving the community located at the original terminus of the service of the railroad. While perhaps that might have been one thought in the mind of the legislature at the

time it enacted this section, the provisions of this section, however, are far too broad to receive such a restricted interpretation. The statute says "no change shall be made" which will involve the abandonment of any part of the road, either partly or completely constructed, without the consent of three-fourths in interest of its stockholders. The change which Wheeling proposes to make in the case at bar involves an abandonment, and by the abandonment it will change a part of its road and will change that part which is designated in its articles of incorporation as its termini and which has been its termini ever since the days of The Connotton Valley Railway Company in 1883. (R. 183)

The fact that the statute permits a shareholder, who purchased his stock upon the faith of the location of the road or a part thereof, to cancel his purchase at any time within six months after the change has been made or the line abandoned, does not mean that the statute should receive the narrow interpretation which counsel for Wheeling proposes to place upon it. The shareholders of Wheeling are indeed vitally interested in the abandonment by Wheeling of its downtown and main passenger station in the City of Cleveland. They are indeed vitally interested in seeing to it that Wheeling, in taking up passenger station facilities in the union depot of Terminals, is not going to be burdened with an obligation which it cannot afford to meet at the only alternative of securing another passenger station site of its own which will not be and cannot be as favorably located as its present one. In other words, the legislature of the State of Ohio, in enacting Section 8747 of the General Code, did not mean thereby to restrict its application to railroads in the process of construction, for by the very use of the words "that no change shall be made which will involve the abandonment of any part of the road either partly or *completely constructed*" it is shown that

they intended it to apply to a railroad completely constructed as much as to one which was partly or in the process of construction. The Supreme Court of Ohio in the case of *The Pittsburgh & West Virginia Railway Company v. The Public Utilities Commission of Ohio,* 120 O. S. 434, did not pass upon this question.

The reference made by counsel for Wheeling to Section 8753 of the General Code, which permits a railroad company to change or relocate any portion of its road when the same is necessary for the purpose of avoiding annoyance to public travel or dangerous or difficult curves or grades, means for the purpose of avoiding annoyance to the public which travels over Wheeling's line and for the purpose of avoiding dangerous or difficult curves on Wheeling's line. No one can impute to the legislature that it meant thereby to authorize the change in grade or a portion of any line of one railroad for the purpose of avoiding annoyance to public travel or dangerous grades upon the line of another railroad. The statement of counsel for Wheeling that unless it abandons its Ontario Street Passenger Station Site a safe and practical approach to the union terminal from the east cannot be constructed is without foundation. By removing the Eagle Avenue ramp, which was built over Wheeling's protest, both Wheeling and Terminals can use Wheeling's Ontario Street Passenger Station Site and Wheeling will not then be running the risk of being burdened with an obligation which it cannot afford to bear or the risk of securing passenger station facilities in a less favorably located part of the City of Cleveland. Its shareholders are deeply interested in such a program, and the legislature of Ohio saw fit to require the consent of Wheeling's shareholders to such a program in order that they might adequately protect their investment and the future of their company.

(b) It is an extension of Wheeling's line of railroad.

In an effort to escape the provisions of Section 8772 of the General Code of Ohio, which requires the consent of a majority of the shareholders of a railroad company whenever the company desires to extend its line of road beyond its previously designated termini, counsel for Wheeling attempt to argue that, because this section of the Code requires the president and directors, after the extension has been authorized, to file a certificate of that fact naming the places of the new termini of the road and the county or counties through or into which the extended line will pass and file it in the office of the Secretary of State, it is apparent that the statute does not apply to such an extension as is here proposed, to-wit, an extension of only twelve hundred feet. As pointed out by counsel for appellant in its main brief, Section 8746 of the General Code of Ohio requires that the terminus of a railroad located in a boundary county shall be definitely fixed and located and that a certificate of that fact shall be filed with the Secretary of State. When Wheeling was incorporated in 1916 it definitely fixed the terminus of its road in Cuyahoga County, which is a boundary county, by stating that the terminus thereof should be the terminus of the old Wheeling & Lake Erie Railroad Company which was and is Wheeling's Ontario Street Passenger Station Site. The effect of that which Wheeling now seeks to do is to change this definitely fixed and located terminus in the boundary county of Cuyahoga, Ohio, by extending the same to the north some twelve hundred feet. Such it cannot do under Section 8772 of the General Code of Ohio until it has obtained the consent of a majority of its shareholders and, if and when it obtains such consent, it must then in compliance with Section 8746 of the General Code file with the Secretary of State the certificate definitely locating and fixing that terminus in the boundary county of Cuyahoga. So it

is submitted that the certificate required to be filed by Section 8772 does not merit the construction placed thereon by counsel for Wheeling but this section of the Code must be construed with other sections applicable to the same subject matter and when so construed, particularly in view of Section 8746 of the General Code, it shows conclusively that any extension of the line beyond its previously designated termini cannot be made without the consent of its shareholders.

(c) It is an aid and a sale of part of a railroad to another, and a lease of a railroad to another.

In an effort to escape these provisions of the Ohio Code, counsel for Wheeling attempt to argue that Terminals is not a railroad because the statutes under which it is incorporated are entitled "Public Service Corporations other than Railroads." The conclusive answer to this question, it seems to counsel for the appellant, lies in the provisions of Sections 9162 and 9168 of the General Code of Ohio, applicable to union depot companies, in which it is provided that such union depot companies shall have the powers given railroads for the purpose of acquiring, constructing and operating its depot tracks and terminals and that all laws for the protection of railroads and relating to or enforcing the duties and obligations of its officers shall be applicable to such union depot companies. These sections are set forth in full on page 104 of appellant's brief in chief.

If a railroad company must have stockholders' consent before it can aid, lease or sell any part of its property to another railroad, then Terminals, having no greater power than railroads, must have the same consent. Furthermore, there is nothing in the General Code of Ohio which prevents a union depot company from likewise being a railroad and when we consider the fact that Terminals in the operation

of its locomotives is going to operate them not only over what may be termed its own terminal tracks and in and out of its depot but that it is going to operate those locomotives, at least insofar as Central is concerned, for the purpose of transporting trains, passengers and property for miles beyond its terminal tracks, it most certainly is a railroad.

Counsel for Wheeling attempt to argue that Section 8807, requiring stockholders' consent to a sale or lease, applies only to the sale or lease of all or a substantial part of another railroad company and this for the purposes of operation. Again counsel for Wheeling are attempting to place a construction upon Section 8807 which its language will not bear. Section 8807 says that a company may lease or purchase *any part* of a railroad not a substantial part. The fact that Section 8807 further says that the purchasing company, after the purchase, shall be vested with all the rights and powers of the company from whom it was purchased does not in any sense lend color to the argument that the purchasing company must purchase a substantial part nor that it must make its purchase for the purposes of operation. And even though such were true, the main downtown passenger station of a railroad the size of Wheeling, located in the heart of the only big city which it serves, which is used by thirty-three per cent of all the passengers that it carries (R. 223) and which produces twenty-six per cent of its total passenger revenue from all sources (R. 223) is indeed a substantial part of its railroad. And moreover Terminals is acquiring this part of Wheeling's railroad for Terminals' operation.

On page 88 of their brief counsel for Wheeling say:

> "But Wheeling does not propose to sell these lands to Terminals until after they are abandoned as a part of a railroad; in other words, not until they have ceased to be 'any part * * * of a railroad.' It is a sale of lands no longer devoted to common carrier service; no longer a *part of a railroad.*"

Such a statement is directly opposed to the testimony of the president and chairman of Wheeling, Mr. Duncan. While Mr. Duncan testified that the considerations in the user contract and the option to sell were in no wise dependent upon the other, yet the agreement to sell was put in the form of an option to sell because Wheeling did not want to be under any obligation to sell and dispose of its Ontario Street Passenger Station Site until it had an agreement for passenger station facilities at a fixed rental. (R. 290) To this extent the sale and abandonment of the railroad property is absolutely dependent upon the user contract in question.

VIII.

THE CONSIDERATION OF $1,600,000 SPECIFIED IN THE OPTION TO SELL IS INADEQUATE.

In an effort to establish that the price of $1,600,000 specified in the option to sell is an adequate consideration for Wheeling's land, counsel for Wheeling devote several pages of their brief to a discussion of the lands actually owned and leased by Wheeling northerly of Eagle Avenue. Their argument is one which is apt to confuse or mislead the Court. The lands which Wheeling actually owned and leased northerly of Eagle Avenue are shown on the map Executive Committee's Exhibit 1 attached to Exhibit 48. Terminals' improvements called for the vacation and relocation of certain streets upon which Wheeling's property abutted and by reason thereof Wheeling claimed that certain portions of the streets thereby vacated became the property of Wheeling. The dispute between Wheeling and Terminals as to what property Wheeling became the owner of by reason of the vacation of these streets was settled in the manner shown in the memorandums attached to the maps identified as Executive Committee's Exhibits 2 and 3 attached to Exhibit 48. This settlement resulted in con-

sidering Wheeling as the owner of that property which is outlined in yellow on the map identified as Executive Committee's Exhibit 4 attached to Exhibit 48. And in the report of the management (Exhibit 48, page 8, paragraph 5) it is expressly stated that the adjustment of the boundary lines of the property of the parties agreed upon in the manner therein above set forth results in Wheeling having an area of 109,341 square feet of which 74,515 square feet, for convenience in reference, is termed "building site area" and 34,826 square feet is termed "right of way site." It was this property so shown on the map Executive Committee's Exhibit 4 attached to Exhibit 48 which Wheeling had appraised by Mr. McCaslin, Mr. Taylor and Mr. Cragin. (See Exhibits 148 149, 150) It isn't with good grace under such circumstances that counsel for Wheeling or counsel for Terminals should argue that it isn't this property that they are selling or that it isn't that which is included in the option to sell. The option to sell not only includes the actual lands which Wheeling owns and leases but it includes also all lands which would accrue to Wheeling by reason of the vacation of streets, and it was agreed that the lands of which Wheeling should be considered the owner due to the vacation of streets are such lands as are outlined in yellow on the map, Executive Committee's Exhibit 4 attached to Exhibit 48. It's the value of that land that we are dealing with, for such is the agreement of Terminals and Wheeling.

Inserted between pages 104 and 105 of Wheeling's brief is a compilation of the cost to Terminals of the parcel of land on Ontario Street beginning with the Public Square and running eastwardly or southwardly along Ontario Street. As pointed out by counsel for appellant in his brief in chief, this compilation made from Exhibits 123 and 135 is of little value for the reason that the purchase price of a goodly number of the parcels shown thereon was the

purchase price dating back as far as 1912, or prices paid for fees subject to ninety-nine year leases negotiated at low rentals and held by the Van Sweringens prior to 1918. The value of such leases is not included in the cost given in the Exhibit. Where ninety-nine year leases were negotiated prior to and back as far as 1918 they were upon a flat rental basis, which rentals, when capitalized at six per cent, represent what was paid for the fee in later years. The prices paid in such instances are prices which represent the value of the property at the time the leases were negotiated. But the price paid for the fee of Wheeling's leased land in October of 1927 shows conclusively the inadequacy of the consideration. This parcel is parcel No. 73 on the tabulation attached to Wheeling's brief. Your honors will there observe that that parcel containing 5677 square feet with a frontage on Ontario Street of 120.13 feet cost $168,500.00 or $29.68 per square foot. This was subject to Wheeling's lease which the well-informed appraisers called to testify on behalf of Wheeling and Terminals testified was worth $40,743.81 per square foot. (R. 430, 444) Adding this you get a total cost per square foot of parcel No. 73 of $36.85 per square foot. Let us now turn to Executive Committee's Exhibit 4 attached to Exhibit 48 and in the little square thereon, which indicates the leased property of Wheeling, write its value of $36.85 per square foot. If we then examine the testimony of the real estate witnesses of Terminals and Wheeling we will see that on the building area, shown on Executive Committee's Exhibit 4 attached to Exhibit 48, only one of their appraisers, Mr. Taylor, placed a value as high as $20.00 per square foot (Exhibit 149), while all the remaining appraisers appraised it at less than $20.00 per square foot. It was Mr. Taylor's appraisal which was used as the foundation for the consideration of $1,600,000 specified in the user contract. Certainly this is proof conclusive that the consideration of $1,600,000 is grossly inadequate.

While Wheeling's counsel attempt to argue on pages 107 and 108 that the development of air rights over Wheeling's land is impracticable, Mr. Jouett, Terminals' engineer in charge of construction, advises us (R. 351) that the construction work to be done upon Wheeling's property by Terminals calls for proper allowance being made for the sinking of caissons to support future air right structures. The testimony of Mr. D'Esposito upon this point certainly and most conclusively shows that neither from an economic standpoint nor from an engineering standpoint is the cost of future air right developments such as to make the same impracticable. Mr. D'Esposito definitely testified that the normal burden upon land occupied by railroad tracks and over which it is sought to develop air rights is $25.00 per square foot, $10.00 of which is due to the loss of basement space. Inasmuch as there will be no loss of basement space so far as Wheeling's property is concerned, that burden, according to Mr. D'Esposito, has been decreased to $15.00. But due to the fact that it is unwise to sink caissons between the tracks which Terminals proposes to construct across Wheeling's property due to the turn-outs and cross-overs which necessitate a spanning of those tracks by large and heavy girders, Mr. D'Esposito says that this would put a burden upon Wheeling's property of about $5.00 per square foot, making the total burden $20.00 per square foot as compared to the normal case of $25.00 for air right development.

IX.

WHEELING HAS NOT HAD THE BENEFIT AND JUDGMENT OF A DISINTERESTED DIRECTORATE.

In attempting to show that Wheeling has had the benefit and judgment of a disinterested directorate, counsel for Wheeling argue, on page 116 of their brief:

> "In 1924, before anyone interested in Terminals had acquired any control of Wheeling, Mr. Duncan indicated that Wheeling would go into the station if it could do so without increasing its expenditure for station purposes in Cleveland. When Wheeling finally agreed, in 1928, to the user contract, it was upon the identical terms indicated by Mr. Duncan in 1918 and expressly stated by him to Mr. Van Sweringen in 1924, to-wit, it went in at a rental not exceeding the cost of maintaining its own station. How can anyone detect in this steady maintenance by Wheeling of the position that it would not pay for accommodations in the Terminals more than it would pay elsewhere, any evidence of domination and control of the Wheeling board and management after the acquisition of the stock interest by the three railroads?"

The difficulty with this argument is that Wheeling does not have an agreement for the use of Terminals' facilities at a rental which does not exceed the cost of maintaining its own station. Beyond question Terminals, which does not deny but what it is a common carrier, which has considered itself as such by applying to the Interstate Commerce Commission for authority to issue its bonds, will, as soon as it acquires Wheeling's Ontario Street Passenger Station Site, take steps to place Wheeling upon a parity with other carriers using its facilities. Neither Wheeling nor anyone else can complain when such action is taken, for by the very provisions of the user contract it is made subject to all existing and future federal or state laws and to all rules or orders made by any board, commission

or body having competent authority to regulate any of the parties thereto. (R. 130) The rental then specified in the user contract will be put up to a point beyond that which Wheeling can afford and will place upon Wheeling a burden which it must bear for at least five years before it can withdraw, and, at the end of five years, Wheeling will be faced with the necessity of either continuing to carry that burden or go elsewhere and look for a passenger station site. Directors of a company seeking to protect their company's interests would not so jeopardize the interests of their company if they had those interests at heart.

Counsel for Wheeling further argue on page 117 of their brief:

> "Furthermore, appellant's attempt (pp. 121 and 122 of its brief) to impeach good faith of the Wheeling management in consenting to the Eagle Avenue Ramp Ordinance and to the lowering of its own tracks thereunder, is disingenuous. Mr. Duncan testified (Record p. 284) that Wheeling finally consented after the City Solicitor had told him that he had received instructions to take action to compel the lowering of Wheeling's tracks. In other words, the question was going out of the realm of argument into that of litigation, with Wheeling resisting what the entire community regarded as a great public improvement. It was this litigation that the Wheeling management regarded as threatening its relations with the public and its shippers and which induced it to acquiesce in the ordinance."

But as is shown by the same page of the record, Manager Hopkins in 1926 told Mr. Duncan that the situation with respect to the Eagle Avenue ramp was unfortunate but that there was nothing left for the city to do but to take whatever steps might be necessary to have the Eagle Avenue ramp completed, and Manager Hopkins was insisting that it be completed at as early a date as could be. These

threats of Manager Hopkins in 1926 did not disturb Wheeling's directors. Why then did similar threats from the City Solicitor in 1927 disturb them? And the only answer is that stock control had changed in the meantime.

X.

THE COMMISSION DID HAVE JURISDICTION TO APPLY THE STATUTES OF THE STATE OF OHIO AND THE GENERAL PRINCIPLES OF LAW HEREIN CONTENDED FOR.

In answer to appellant's contention upon this question counsel for Wheeling call attention to a number of cases which are to the effect that the Commission is not a judicial tribunal but is rather an administrative body. With this counsel for appellant agrees, but in performing the duties enjoined upon it by statute, the Commission must of necessity construe those statutes and others as well. If this were not true no finding of the Commission could ever be contrary to law. Yet the very authorities cited by Wheeling are to the effect that one of the grounds upon which an order of the Interstate Commerce Commission might be enjoined is that it is contrary to law.

In support of their position counsel for Wheeling refer to the case of *Wheeling & Lake Erie Railway Company v. Pittsburgh & West Virginia Railway Company*, 33 Fed. (2nd) 390, and argue that the quotation cited from the opinion of the court is to the effect that the statutes of Ohio requiring stockholders' approval are not to be passed upon by the Commission. That the opinion of the court is not susceptible of that construction is shown by the opinion of the same court in *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Jackson*, 22 Fed. 2nd. 509, in which Jackson as a shareholder sought to restrain

the New York Central from voting the stock which it owned in the Big Four Railway Company in favor of a lease by the Big Four Railway Company of its lines of railroad to the New York Central. At the time suit was filed there was pending before the Commission an application of the New York Central seeking the approval of the Commission to the lease in question. Jackson sought an injunction upon the grounds of fraud, inadequacy of consideration and violation of Sections 8806, 8807, 8808 and 8809 of the General Code of Ohio. An interlocutory injunction granted by the District Court was reversed by the Circuit Court upon the grounds that the Commission not only had authority but that it was its duty to consider, determine and protect the rights of the minority shareholders and that if any shareholder was aggrieved by the order of the Commission his remedy was to enjoin the enforcement of such order. Thus the court said on pages 510 and 511:

> "We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration, terms, and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in the *Nickel Plate Case,* 105 Interst. Com. Com'n. R. 425, evidences such an interpretation of its duties by the Commission.
>
> "While it is true, as plaintiff contends, that the law does not require that minority stockholders be made parties to a proceeding before the Commission seeking the approval of a lease, it is also true that the Commission has heard such stockholders when requested to do so, and that the statute itself, as we construe it, requires that the interest of the stockholders be considered and protected. Furthermore, the orders of the Commission authorizing a lease are subject to review on behalf of a stockholder in a court proceed-

ing. *Chicago Junction Case,* 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667; 38 Statutes at Large, p. 220 (28 U. S. C. A. Sec. 47). It results, therefore, that before the lease can be made effective, an objecting stockholder has the right to present his case before two tribunals, both of which are charged with the duty of protecting his interest.

"In view of these rights of the plaintiff, we do not find it necessary to consider the claims of fraud or inadequacy of consideration, or to determine what effect, if any, the Transportation Act had upon the ordinary rules of law and equity or upon the laws of Ohio (Sections 8809-8813, both inclusive, General Code of Ohio), prescribing the conditions upon which railways may be leased."

Thus we see that in the *Jackson* case the Circuit Court of Appeals said that it was the Commission's duty to consider and pass upon the claims of minority shareholders and if the minority shareholders felt themselves aggrieved by the findings of the Commission they had a right to proceed in court to enjoin the order of the Commission. In other words, in the *Jackson* case the Circuit Court of Appeals advised Mr. Jackson to present his claims of fraud and inadequacy of consideration and the necessity of stockholders' consent under the laws of the State of Ohio to the Commission and if, after the Commission had heard and passed upon his complaint, he felt himself aggrieved, then he could proceed in court to enjoin the order of the Commission.

XI.

THE DISTRICT COURT ERRED IN FINDING AND HOLDING THAT THE QUESTION OF ADVERSE INTEREST OF WHEELING'S DIRECTORS AND THE QUESTIONS RAISED UNDER THE STATUTES OF THE STATE OF OHIO REQUIRING STOCKHOLDERS' CONSENT WERE MATTERS WHICH COULD NOT BE CONSIDERED BY IT.

It is contended by counsel for Wheeling that the District Court did not hold that the question of adverse interest of Wheeling's directors and the questions raised under the statutes of the State of Ohio requiring stockholders' consent were matters which could not be considered by it. Counsel for Wheeling say that the District Court did consider the fact that the contracts were invalid because Wheeling was controlled by the same stockholders as control Terminals and that the District Court found that such alleged control did not avoid the contracts because the contracts were in fact fair to Wheeling. The opinion of the District Court, however, found on page 486 of the record speaks for itself. It is true that the court found that the contracts here in question were fair to Wheeling, but it made such finding by considering the user contract and the option to sell as wholly interdependent and the considerations therein expressed as single. (R. 494) Counsel for Wheeling in their brief on page 65 admit that such finding was against the uncontradicted testimony and that such a finding, had it been made by the Commission would have been arbitrary as opposed to the uncontradicted evidence. Identically the same thing must be true of the finding of the District Court, and inasmuch as the District Court found that the contracts here in question were fair to Wheeling by making a finding opposed to the uncontradicted evidence, the conclusion naturally follows that had the court confined itself to the evidence, it would have found that the contracts here in question are not fair.

Counsel for Wheeling, on page 126 of their brief, further say that the District Court considered appellant's contention with reference to the necessity for stockholders' consent under the statutes of Ohio and found them inapplicable. The District Court did no such thing. The language of the District Court, being the only language that can be found in their opinion with respect to the necessity for stockholders' action, is as follows (R. 495):

> "Lastly, it is contended that the contracts of abandonment and user are illegal under the Ohio law in that they have not been approved by the required vote of the stockholders of either Wheeling or Terminals. Matters of procedure and conditions precedent controlling the action to be taken are within the jurisdiction of the Interstate Commerce Commission, and, Congress having acted by vesting power in such commission under the circumstances here involved, requirements prescribed the State must yield to the paramount control of the federal government. *Colorado v. U. S., supra.*"

XII.

THE DISTRICT COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE CERTAIN ADDITIONAL TESTIMONY OFFERED BY APPELLANT.

The reason that the record in this case contains no statement as to the nature of the additional testimony, which counsel for the appellant desired to offer, is very obvious when we examine the rulings of the court made at the time of the hearing on September 10, 1929, and examine the court's opinion. On September 10, 1929, the District Court desired to proceed solely upon the record of the proceedings had before the Interstate Commerce Commission and to continue the hearing until after it had considered the questions presented based upon the record

made before the Interstate Commerce Commission. While appellant took exception to this method of procedure, it could not at that time have dictated into the record the nature of the additional testimony which appellant desired to offer for the reason that the court had not ruled to exclude it. (R. 485) When the court handed down its decision it said:

> "We do not overlook the provision that plaintiff was entitled to offer evidence as to the so-called private grievances. Unless the court should think that, *as a matter of law,* those alleged grievances must be excluded from consideration in this case. With our view of the validity and effect of the Commission's certificates we think this exclusion follows and that the case is therefore right for final decree. As to those issued we *in effect sustain our motion to dismiss.*" (Italics ours.)

Thus the court dismissed appellant's amended bill of complaint as to those issues which the District Court termed "private grievances." For the reasons set forth in appellant's brief in chief on pages 131 to 135 counsel submits that such ruling on the part of the District Court was error.

XIII.

THE QUESTION OF PUBLIC INTEREST.

On page 18 of the brief of counsel for Wheeling, and again on page 130, it is stated that the appellant is foreclosed from making any argument on the question of public interest for the reason that there is no allegation to that effect in appellant's amended bill. However, in Paragraph L (R. 32, 33) and in Paragraph LI (R. 35) it is specifically alleged as to both the user contract and the option to sell that the same were not in the public interest and that the finding of the Commission thereon was not only contrary to law and arbitrary but without evidence to support it.

In the brief of Terminals and on page 17 thereof Terminals directs the Court's attention to the case of *New York City v. Pine,* 185 U. S. 93, in which case a resident of the State of Connecticut brought an action against the City of New York to restrain it from constructing a dam in New York State upon the grounds that the construction of such dam would divert a certain water course which abutted plaintiff's property in the State of Connecticut. The trial court granted the plaintiff an injunction but this Court vacated the same upon the grounds that, for a period of two years prior to the time that plaintiff had filed suit and during which time the City of New York had nearly completed its dam, the plaintiff and the City had been attempting to agree upon the amount of compensation which the plaintiff would sustain by reason of the construction of such dam, thereby lulling the City of New York into a belief that plaintiff was seeking compensation and was not insisting that it would not deal upon a compensation basis or any other basis. As the Court said in its opinion:

> "It is one thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it should be respected. *In the latter case the defendant acts at his peril.* In the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of validity and extent of the right; in the former he presents the right as the foundation of a claim for compensation and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages."

In the case at bar Terminals clearly acted at its peril. The record shows that at no time from 1918 down until the time stock control passed to the same interests that controlled Terminals, did Wheeling state its right and proffer

a waiver thereof for compensation. Wheeling at all times demanded that its rights should be respected and the attempt upon the part of Terminals to invoke in its favor the doctrine of relative convenience and injury is thus an attempt to pull itself up by its own boot straps. Moreover, the doctrine announced in the case of *New York City v. Pine* was applied because the plaintiff in that case could be adequately compensated for the damages which he might sustain. But such is not true in the case at bar. No one can estimate the damage which Wheeling and its shareholders will sustain when, after abandoning its favorably located passenger station site and taking up passenger station facilities in the depot of Terminals, the rental in its user contract is raised to a point that Wheeling cannot afford to pay. By virtue of the provisions of the contract which make it subject to the present and future federal and state laws and to change by the order of any board or commission, then, though Wheeling is burdened with an obligation which it cannot afford to carry, from whom will Wheeling or the appellant or the other shareholders recover the damages that they sustain by virtue of that increase in rental? And, if after bearing that burden for a period of five years Wheeling takes up passenger station facilities in some other location in the City of Cleveland not as favorably located as its present passenger station, who can estimate the damages that Wheeling will sustain by such a forced change in the location of its main downtown passenger station? Terminals acted at its peril from 1922, when it started the construction of its depot, until 1927, when by reason of the fact, as the District Court found (R. 488) that it was making no progress in the acquisition of Wheeling's station site, Central, Nickel Plate and B. & O. purchased stock control of Wheeling. And from the very moment that such stock control was acquired appellant and other shareholders representing in all a ma-

jority of the preferred and common stock of Wheeling protested their every move in that direction. It is submitted that the doctrine of *vigilantibus non dormientibus aequitas subvenit* is peculiarly applicable and should be applied in the instant case.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the District Court should be reversed and that the orders of the Interstate Commerce Commission herein complained of should be enjoined.

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FILE COPY

No. 680

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In the Supreme Court of the United States

OCTOBER TERM, 1929

PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
APPELLANT

v.

WHEELING & LAKE ERIE RAILWAY COMPANY ET AL.,
APPELLEES

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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APRIL, 1930.

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 680

PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, appellant

v.

WHEELING & LAKE ERIE RAILWAY COMPANY; THE Cleveland Union Terminals Company; the Cleveland Terminals Building Company; Erie Railroad Company; the Cleveland, Cincinnati, Chicago & St. Louis Railway Company; the United States of America, and the Interstate Commerce Commission, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

DESIGNATIONS

In this brief the Pittsburgh & West Virginia Railway Company will be referred to as the appellant; the Wheeling & Lake Erie Railway Company

will be referred to as the Wheeling; the Cleveland Union Terminals Company will be referred to as Terminals; the Cleveland Terminal Building Company as Building; the New York Central Railroad Company will be referred to as the Central; the New York, Chicago & St. Louis Railroad Company will be referred to as the Nickel Plate; the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company will be referred to as the Big Four; the Baltimore & Ohio Railroad Company will be referred to as the B. & O.; and the Erie Railroad Company will be referred to as the Erie.

OPINIONS

The opinion of the specially-constituted District Court (R. 486) is not yet reported.

The report of the Interstate Commerce Commission appears as *Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company,* 154 I. C. C. 516. (R. 38.) A related report, not reproduced in the record, is the *Cleveland Passenger Terminal Case,* 70. I. C. C. 659.

JURISDICTION

The suit was commenced August 21, 1929, under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219; U. S. C., Title 28, Section 47) to enjoin, set aside, annul and suspend a certain certificate of public convenience and necessity of the Interstate Commerce Commission issued July 9, 1929,

which, in acting upon an application of the Wheeling, ordered the issuance of certificates of public convenience and necessity permitting the Wheeling to make use of passenger station facilities and service in the union depot of the Cleveland Union Terminals Company, to operate in passenger and allied services the necessary connecting tracks and sidings of the said Terminals Company, to abandon a certain portion of its line, together with its Ontario Street passenger station in the City of Cleveland, and, pending the final completion of the Terminals Company's facilities, to make use of the Huron Street station of the Erie and certain tracks of the Big Four necessary to give access to said last-named station. (R. 61–2.)

On December 11, 1929, the final decree of the court below was entered denying appellant's motion for temporary injunction and dismissing the bill of complaint upon the merits. (R. 406.)

On January 2, 1930, this appeal to the Supreme Court of the United States was duly allowed by said District Court. (R. 507.)

QUESTIONS

Where the Commission has granted to the carrier its certificate of authority to abandon certain track and terminal facilities and to acquire right of user in certain new track and passenger terminal facilities, upon findings that the public convenience and necessity will be served thereby, do the follow-

will be referred to as the Wheeling; the Cleveland Union Terminals Company will be referred to as Terminals; the Cleveland Terminal Building Company as Building; the New York Central Railroad Company will be referred to as the Central; the New York, Chicago & St. Louis Railroad Company will be referred to as the Nickel Plate; the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company will be referred to as the Big Four; the Baltimore & Ohio Railroad Company will be referred to as the B. & O.; and the Erie Railroad Company will be referred to as the Erie.

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QUESTIONS

Where the Commission has granted to the carrier its certificate of authority to abandon certain track and terminal facilities and to acquire right of user in certain new track and passenger terminal facilities, upon findings that the public convenience and necessity will be served thereby, do the follow-

ing grounds, urged in the suit of a minority stockholder of the carrier, warrant the setting aside of such grant of authority:

1. That the contract of user in the new terminal facilities may in the future be found by the Commission to be so favorable as to amount to the giving of an undue preference, thereby rendering the contract unlawful.

2. That the application for such authority was made pursuant to resolution of directors, elected to office by vote of stock subsequently found by the Commission to have been acquired in contravention of the terms of the Clayton Anti-Trust Act.

3. That the Commission disclaimed jurisdiction to determine whether the laws of Ohio required the proposed undertaking, or portions thereof, to be approved by two-thirds vote of the carrier's stockholders.

4. That the Commission disclaimed jurisdiction to fix the sale price for the property authorized to be abandoned.

STATUTES

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended by Transportation Act, 1920, 41 Stat. 456, 477, 478 (U. S. Code, Title 49, Sec. 1 (18–22)), reads as follows:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the con-

struction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided

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with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operated.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any contsruction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any viola-

tion of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commision conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be

located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Paragraph (4) of Section 3 of the Interstate Commerce Act (24 Stat. 379) as amended by the Transportation Act, 1920 (41 Stat. 479) (U. S. Code Title 49, Sec. 3 (4)) referred to by the Commission in its report (R. 51) is as follows:

(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facil-

ities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

STATEMENT

1. *Preliminary.*—Facts leading up to the issuance by the Commission of its certificate of July 9, 1929, the setting aside of which is sought in this case, may be stated as follows:

In 1921, the Central, the Big Four, and the Nickel Plate applied to the Commission for certificates of public convenience and necessity under paragraph (18) of Section 1 of the Interstate Commerce Act (supra, p. 4) for the construction and operation through a subsidiary company of a passenger terminal in Cleveland, Ohio. A contemplated feature of the project was a large union station to be located conveniently near the downtown district of Cleveland.

Intervening interests opposed the project as unduly expensive and as offering opportunities for unreasonable profit to certain parties joining in the proposal. After extensive hearings, Division 4 of the Commission found that the evidence presented

did not indicate that the plan proposed was compatible with public interest, and therefore dismissed the application. (*The Cleveland Passenger Terminal Case,* 70 I. C. C. 342.) In the report it was suggested that "possibly the presentation of further evidence or the modification of the plan in various particulars might make possible a different conclusion * * *." Pursuant to this suggestion the case was reopened for consideration by the Commission as a whole and additional evidence was presented. On December 6, 1921, the Commission rendered its report, finding that the project was required by public convenience and necessity, and issued the certificate prayed for. (70 I. C. C. 659.) In reliance upon the certificate, construction work was commenced in 1922 by Terminals and has continued up to the present time, the whole program of construction being now close to completion.

The Wheeling was not included among the joint proprietors in the enterprise, one reason being, apparently, that it was recognized by all concerned that its financial condition and passenger traffic requirements did not warrant its participation upon such basis. But it was apparent from the beginning that its cooperation upon some basis was essential to enable the proposed union station to be operated at maximum efficiency because the most practicable approach to the proposed site was over lands occupied by the Wheeling's Ontario Street Station and tracks, lying just east thereof. The earlier negotiations by Terminals with the Wheeling

were directed toward the securing of an easement permitting it to lay and operate track over a 1,000-foot strip of said lands at a level not occupied by tracks of the Wheeling. This plan was made feasible by the fact that the strip of land was located on a terraced hillside.

However, in October, 1927, the City of Cleveland enacted an ordinance, whereby it was to vacate certain streets and alleys embraced within the new station project in consideration of an undertaking by Terminals to construct, or pay for the construction of, an inclined viaduct or ramp which would extend Eagle Avenue from the top of the hillside down into the Cuyahoga River Valley. The city's plan for a viaduct, suitable to the topography, left insufficient clearance for operation of the two contemplated levels of track thereunder. This development necessitated a change in the Terminals' negotiations with the Wheeling. Thereafter they were directed toward purchase of the Wheeling's passenger station lands and the effecting of an arrangement for the use by the Wheeling as a tenant of the proposed union station facilities in lieu of its Ontario Street Station. These negotiations having been concluded, the Wheeling, on December 7, 1928, entered into the following agreements pursuant to resolutions of its Board of Directors:

(a) An agreement with Terminals whereby Terminals was to furnish to Wheeling passenger station facilities and service for the period of 100 years, the compensation

for the first 25 years to be $20,000 per annum for a normal number of 3,000 trains containing not to exceed 14,000 cars; for the second 25 years, upon the same basis, subject to adjustment in the event of an increase in the direct cost of furnishing such passenger station facilities and service; and for the last 50 years to be determined by mutual agreement or arbitration. (R. 121–129, Ex. 15.)

(b) A contract with Erie for the furnishing of temporary passenger facilities to Wheeling at the Superior Avenue Station of Erie, and for temporary right to Wheeling to use Erie's tracks to reach said station pending the completion of Terminals Union Depot. (R. 134, Ex. 16.)

(c) A contract with Big Four for the temporary use of certain tracks to reach said Superior Avenue Station. (R. 145, Ex. 17.)

(d) A contract with Terminals providing that Terminals would reimburse Wheeling for expenses incurred under the temporary contracts with Erie and Big Four. (R. 153, Ex. 18.)

(e) A contract with Building whereby Wheeling is granted an option to sell its Ontario Street Station site to Building at any time within five years for $1,600,000. (Ex. 11.)

2. *Proceedings before the Commission.*—Pursuant to resolution of its Board of Directors the Wheeling, on December 8, 1928, filed with the Commission, in F. D. 7298, an application, under para-

graphs (18) to (20) of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing it:

(a) To operate in passenger and allied services for a period of 100 years a proposed connecting track and passing siding of Terminals;

(b) To acquire for a period of 100 years passenger station facilities and service in the new union depot of Terminals;

(c) To operate temporarily a portion of an industrial siding track of Wheeling, tracks and station facilities of Erie and tracks of Big Four, all in the City of Cleveland, Ohio.

On the same day it filed with the Commission, in F. D. 7299, an application under the same provisions of the Act for a certificate of public convenience and necessity authorizing it to abandon a portion of its line of railroad, including its Ontario Street Passenger Station.

Appellant, Pittsburgh & West Virginia Railway Company, intervened in opposition to the applications in both said proceedings, and Terminals intervened in support thereof. The proceedings were consolidated and, following hearings, the filing of briefs and oral argument before the Commission as a whole, the Commission issued the certificates prayed for after making the requisite findings of public convenience and necessity. (R. 53–54; 154 I. C. C. 516, 528.)

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3. *Proceedings before the lower court.*—Thereafter, appellant, a minority stockholder of Wheeling, filed its bill of complaint (R. 497) seeking to enjoin said certificates of the Commission and, as heretofore said, the court below ordered said bill of complaint dismissed (R. 495). The main grounds urged by appellant against the validity of the certificates of public convenience and necessity granted by the Commission are:

> (1) That Wheeling's contract for the use of the station facilities of Terminals is not in accordance with any filed tariff; that it is unjustly preferential and discriminatory and provides for a rebate; that the Commission's findings with respect to the preferential character of said contract are contrary to law, and arbitrary in that they disregard the testimony;
>
> (2) That the Commission had jurisdiction to withhold, and should have withheld, its certificates for the reason that the action proposed by Wheeling was authorized by Directors elected through the votes of stock acquired by Central, Baltimore & Ohio, and Nickel Plate, contrary to section 7 of the Clayton Act and section 8683 of the General Code of Ohio;
>
> (3) That the action proposed to be taken by Wheeling is illegal for want of stockholders' consent as required by Sec. 8747, 8809 and 8772 of the General Code of Ohio, and that the Commission has jurisdiction to consider and apply the statutes of the State of Ohio;

(4) That the contract giving Wheeling an option to sell its passenger station lands for $1,600,000 is voidable and should be voided because the price specified is inadequate;

(5) That Wheeling's contract for the use of station facilities and its contract giving it an option to sell its station lands are voidable and should be voided because Wheeling has not had the benefit and judgment of a disinterested directorate.

(6) That it is not in the public interest to permit Wheeling to carry out the terms of its contract for use of the new union station facilities and of its option to sell its Ontario Street Station lands.

ARGUMENT

I

The Commission's administrative findings upon questions arising under paragraph (18) of Section 1 have the same finality, when supported by evidence, as its other administrative findings

(a) While appellant asserts that the Commission's findings in certain particulars "ignore the testimony offered," it makes no contention that any of the Commission's findings are without substantial support in the evidence

Appellant contends that in certain particulars, which will hereinafter be discussed, the findings "ignore the testimony offered," but it makes no contention that any of the Commission's findings are unsupported by evidence. The rule in respect of the conclusiveness of the Commission's findings of administrative fact is stated in *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 663, as follows:

> The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, in conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested.

That the administrative discretion of the Commission is not confined to questions of discrimination or reasonableness of rates, but is coextensive with the regulatory powers conferred upon it by Congress is particularly well brought out in *Dayton-Goose Creek Ry.* v. *U. S.,* 263 U. S. 456; in *R. R. Comm.* v. *So. Pac. Co.,* 264 U. S 331; and in the *New England Divisions Case,* 261 U. S. 184.

In the *Dayton-Goose Creek Case, supra,* the court said, at p. 478:

> It was insisted in the two cases referred to (*Wisconsin R. R. Comm.* v. *C. B. & Q. R. R.,* 257 U. S. 563, and *New England Divisions Case,* 261 U. S. 184), and it is insisted here,

> that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

Moveover, this court has expressly stated that the granting or refusing of a certificate of public convenience and necessity, pursuant to paragraphs (18) to (20) of Section 1, is an exercise of administrative judgment. Speaking of the power of the Commission to authorize abandonment of a branch line, upon finding that the public convenience and necessity permits thereof, the court said in *Colorado* v. *U. S.*, 271 U. S. 153, 166:

> The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

In *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, the court said at p. 273:

> The function of the court upon an application for an injunction under paragraph 20 is

> a very different one from that exercised by the Commission when, having taken jurisdiction under paragraphs 19 and 20, it grants or refuses a certificate. The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 295.

(b) Appellant's contention that Wheeling's contract for the use of the new terminal facilities is preferential and discriminatory and that for that reason the Commission's authorization should be voided assumes that the court may substitute its judgment for the administrative discretion of the Commission

Appellant contends that Wheeling's contract of user in the new terminal facilities is preferential and discriminatory. Referring to this contention of appellant the lower court said:

> It is insisted that the Cleveland Union Terminals Company is a carrier for hire under the Interstate Commerce Act and within the control of the Interstate Commerce Commission obligated to render service to all who apply without discrimination and expressly prohibited by the Act from discriminating in rates and charges as between connecting lines; that Wheeling cannot afford to assume equality of financial obligation with New York Central, Big Four, Nickel Plate or other companies which may sub-

> sequently avail themselves of the right to use the terminal and is financially unable to assume a proportionate share of the capital charges or to pay rentals upon a strictly wheelage or car use basis; that a contract offering service at a lesser rate which Wheeling can afford to pay is invalid as preferential and is subject to avoidance as discriminatory, and that the granting of the certificate of public convenience and necessity was wholly and erroneously predicated upon an assumption of the legality of such user contract. (R. 491.)

Appellant, a stockholder of Wheeling, is, then, opposing a contract which it claims to be so favorable to Wheeling as to be prejudicial to other carriers. Its theory of its standing in court to assert this as its own grievance is that, if the Commission should at some time in the future find the contract to be unduly preferential, the Wheeling might be required to pay a rental in excess of its ability, resulting in receivership. (R. 49–50.)

In appellant's brief (p. 73) the self-contradictory statement is made that "No doubt due to the finding that they were without jurisdiction in the premises, the Commission made no finding concerning the rate specified in the contract and thus ignored the testimony offered relative thereto * * *. They contented themselves with a finding that the rate was preferential * * *." The statement that the Commission found the rate preferential will be presently discussed. At the mo-

ment it is desired to point out that the Commission did not hold that it was without jurisdiction to consider the terms of the user contract in so far as it was its duty so to do in a proceeding under paragraphs (18) to (20) of Section 1.

The Commission did point out that its compulsory power under paragraph (4) of Section 3 to require owning carriers to permit the use of their terminals and track and to fix the terms of use in the event of the failure of the carriers to agree could not be the source of power over the terms of a contract which, as here, had been agreed upon. (R. 51.) It is also true that the report as a whole plainly shows the Commission's views that Congress, in empowering it to grant or withhold its permission for new construction and operations, did not intend it to intrude upon the carriers' managerial discretion further than necessary to properly determine whether or not its grant of authority would serve the public convenience and necessity.

In any application under paragraph (18) the Commission's first consideration is whether or not there is need for the proposed new construction. If the project is purely competitive, that is, if the public is already adequately served by other carriers the application is, of course, denied. *Proposed Construction by Piedmont & Northern,* 138 I. C. C. 363. Even though the public is in need of additional facilities the Commission must further determine whether or not the cost will impair the

financial stability of the carrier. (Sec. 1 (21); *R. R. Comm.* v. *So. Pac. Co.*, 264 U. S. 331.) Clearly even this provision of the Act does not contemplate that the Commission shall substitute itself for the officials of the carriers in the negotiating and making of contracts. In short, its duties are supervisory. If, after investigation, it is of the opinion that the public interest will not be served, or that the cost will impair the carrier's ability to perform its duty to the public, it must either refuse its authority altogether or, where practicable, it may impose such conditions as will make the project conform to the public interest. (Sec. 1 (20).) If, on the other hand, it finds the undertaking to be consistent with the public convenience and necessity and that it will not impair the carrier's financial stability, its authorization follows as a matter of course. And this latter was the situation in the instant case, for it was the Commission's opinion, not only that the undertaking was plainly in the public interest, but also that the terms of the contract were favorable to the Wheeling. (R. 51.)

But appellant, as a stockholder of Wheeling, believes the contract to be too favorable, that is, so favorable that at some future time the Commission will have to find it unduly preferential, thereby invalidating it. In fact, in its brief (p. 69, 73), as heretofore said, it claims that in the Commission's use of the word favorable was a finding of preference. As stated in *Mfrs. Ry. Co.* v. *U. S.*, 246 U. S. 457, 481, "It is not any and every discrimination,

preference, and prejudice that are denounced by the Commerce Act. Section 3 * * * renders unlawful any undue or unreasonable preference or advantage * * *. And in the first paragraph of amended Section 15 * * * it is rates, regulations, or practices that in the opinion of the Commission are *unjustly* discriminatory or *unduly* preferential or prejudicial, etc., to which the prohibition is applied." The lower court in its opinion (R. 493–494) says:

> The inhibition against discrimination requires only that equality of charge be made for contemporaneous service of the same or similar kind. Otherwise expressed, the act requires only that all shall be treated the same under the same or similar circumstances. In the present case it is not conceivable that any other carrier could possibly present the same or a similar situation to that occupied by Wheeling. The entire project of Terminals is blocked by and dependent upon the matter of obtaining the Wheeling station site. The construction of the Eagle Avenue ramp effectively destroyed all practical possibility of constructing the terminal without obtaining Wheeling's property. The contracts for the purchase of this property and for granting terminal facilities to Wheeling are wholly interdependent and the cash consideration to be paid Wheeling is predicated not alone upon the strict value of the property as such but rather upon its value in consideration of the substitution of

> another terminal. The two contracts must be considered as one and the consideration as single. * * *

The Commission, by reference to its decision in *M-K-T R. Co.* v. *K. C. T. Ry.*, 104 I. C. C. 203, clearly indicates its view that, as between Wheeling and the proprietary carriers (stockholders of Terminals), there was an utter absence of the like circumstances and conditions upon which a finding of unjust discrimination or undue preference could be predicated. Like the lower court, too, it recognized that there were considerations passing from Wheeling to Terminals other than its annual cash payment of $20,000, making the situation occupied by Wheeling unique, that is, not only differentiating it from the proprietary carriers, but also from any possible future carrier tenant. This is shown by the following statement from the Commission's report (R. 50–51):

> * * * Evidence was submitted by the Terminals Company tending to show that the proposed rental approximates the out-of-pocket cost to it of furnishing facilities and service to the applicant. It is clearly apparent that if the applicant is to continue operating a passenger station at its present site such operation can not be performed over tracks at the same level as the Terminals Company's tracks. The applicant can not operate above the present level because of the fact that its trains could not ascend to the higher level until after they had passed

under the Eagle Avenue viaduct, which was constructed by the Terminals Company as required by an ordinance of the city of Cleveland, as the distance between the viaduct and the nearest track to be installed by the Terminals Company is so short that a grade of approximately 13 per cent would be required. This would create an admittedly impossible operating condition. If the applicant retains its tracks at their present level the Terminals Company will be obliged to construct its tracks below that level. In the latter event the additional cost to the Terminals Company for construction would be approximately $10,000,000, and about two years additional time would be required for the completion of the terminal. In addition, the station tracks and platforms of the Terminals Company would have to be constructed on a grade of approximately 0.56 per cent, resulting in a dangerous situation and more difficult operation. While these facts are not set out in the contract it can not be doubted that they were in the mind of the Terminals Company when the contract was made.

There are many circumstances differentiating Wheeling's situation from that of the proprietary lines. Terminals' locomotives will haul Wheeling's trains a distance of about 2,000 feet from connection between Wheeling's main line and the center of the terminals, while it will haul the trains of Central and Nickel Plate a distance of about 17,500 feet and the trains of Big Four a distance of about

9,000 feet. (R. 317–318.) Wheeling's trains average three cars while the trains of the proprietary carriers average about eight cars. (R. 319.) Wheeling will receive no coachyard service while coachyard service will be provided for the proprietary lines. (R. 318.) There are many other dissimilarities between Wheeling's user and the users of the proprietary lines.

As was stated by the lower court (R. 494) "The whole case was fully presented to the Commission." The Commission gave consideration to the urgent needs of the public and gave full and fair consideration to appellant's apprehensions that Wheeling's favorable contract of user might later be found unduly preferential. There was no need for an express finding that the contract was not unduly preferential, for the statutory finding that public convenience and necessity would be served by the undertaking embraced the whole ground. In this connection what was said in *Colorado* v. *United States,* 271 U. S. 153, with respect to the necessity of making findings not expressly required by the statute seems pertinent. At page 167 the court said:

> While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that

it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. * * * The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. * * * The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate.

II

Even assuming that the statute requires Wheeling's contract with Terminals to be filed as a tariff, the Commission's order authorizing the making of the contract is not invalidated by subsequent failure of the carriers to file the contract as a tariff

One of appellant's grounds of attack upon the Commission's certificate authorizing the contract of user between Wheeling and Terminals is that the

contract has not been filed as a tariff. Even assuming that the contract is a rate, or is otherwise of such nature that it should be included in the carrier's tariffs, it seems altogether clear that the Commission action in authorizing the same can not be set aside for any subsequent failure of the carriers to comply with the statute.

But, while appellant cites provisions of the Act prohibiting transportation of passengers or property without tariff rates on file and forbidding rebates or any departures from the tariffs as filed, it fails to cite paragraph (1) of Section 6 wherein is stated what should be contained in the tariffs. This paragraph reads as follows:

> That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules

> printed as aforesaid by any such common carrier shall plaintly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. * * *

It is apparent that the rates, fares, and charges referred to are those that are charged the public. The public is interested only in charges which are exacted from it. The rental paid by Wheeling is not a constituent element of such charges except that it is a part of its costs of rendering the service just as its fuel, wages paid, and interest on investment are parts of its costs of rendering the service. As contemplated and provided for, the rental is an intercarrier charge, just as the rental charges for locomotives, cars, trackage rights, or for other facilities within the definition of transportation (Sec. 1 (3)) are intercarrier charges. No one will contend that per diem car rentals and trackage rentals are rates or charges within the meaning of Section 6 of the Act.

III

The Commission's authorization is not rendered invalid by reason of the fact that Wheeling's application was approved by directors who were elected by votes of stock subsequently found by the Commission to have been acquired in violation of the Clayton Anti-Trust Act

Appellant contends that the Commission should not have granted Wheeling's applications because they were authorized by directors illegally elected to office. They claim that Wheeling's directors were illegally holding office when they authorized the applications to the Commission is based on the following facts as succinctly recited by the lower court:

> Since Terminals was making no progress in the direction of acquiring the Wheeling station site, the New York Central, the Nickel Plate and the B. & O. Railroad Companies, which latter company had since joined as a prospective user of the terminal, each purchased, prior to May 1, 1927, and without the consent of the commission, one third of a controlling interest in Wheeling and proceeded to exercise such control in the election of the board of directors of that company. It is true that twelve of the fifteen original directors were reelected but the stock control of course tended to destroy freedom of action. Thereafter negotiations were continued and an agreement was

> reached as between the boards of directors of Terminals and Wheeling for the sale of the Ontario Street Passenger station site to the terminal company for $1,600,000, for providing a temporary terminal for Wheeling until the completion of the Union Station and thereafter for the use of the Union Station by Wheeling for a fixed term at a rental of $20,000 per annum for 3,000 trains of not more than 14,000 cars. The agreements of the proprietary companies and the B. & O. Railroad Company are founded upon a car use basis.
>
> The purchase of the controlling interest of Wheeling by the B. & O., New York Central, and Nickel Plate was attacked by minority stockholders of Wheeling, as made without obtaining the approval of the Interstate Commerce Commission, and on March 11, 1929, such purchase was declared to be in violation of section 7 of the Clayton Act and an order of divesture was made by the Commission. * * *. (R. 488–9.)

As above stated, it is appellant's position that the Commission was without authority to act upon an application authorized by directors elected by vote of stock subsequently found by the Commission to have been acquired in contravention of the Clayton Anti-Trust Act. In its report the Commission refers to the reply of the Wheeling that the Commission was without jurisdiction to try the title of a director to his office and that the protestant was endeavoring to sustain a collateral attack upon the

rights of *de facto* directors which, by weight of authority, is not permitted even in a court of law.[1] Thereafter the Commission quoted Section 7 of the Clayton Anti-Trust Act, and said (R. 49):

> It is clear that before a carrier can be held to have violated the provisions of this law there must be a finding of the fact that the acquisition by it of stock in another carrier may be to substantially lessen competition, etc. Such a finding of fact was made by us on March 11, 1929, subsequent to the commencement of the present proceedings, and we neither made that finding retroactive, nor did we find that the acts of the directors elected by the stock owned by the three trunk lines should be nullified. Under the circumstances we are of the opinion that the contentions of the protestant in this respect are without merit.

In *Wheeling etc. Ry.* v. *Pittsburgh & W. Va. Ry.* (Circ. Ct. of Appeals, 6th Circ.) 33 Fed. (2d) 390, the appellee (appellant herein) had obtained an injunction against the carrying out of a contract (supplemental to the one involved in the instant case) whereby Wheeling permitted Terminals to enter upon its Ontario Station site to do certain work to facilitate the building of the new station. The grounds for the injunction were, among other things, that the agreement constituted an abandonment without the prerequisite authority of this

[1] *Cook on Corporations* (8th ed.), secs. 618, 713; *Consol. Inter. C. M. Co.* v. *Callahan M. Co.*, 228 Fed. 528.

Commission and that it would be contrary to Section 7 of the Clayton Act in that it was determined upon subsequent to the acquisition of the stock of the Wheeling by the Central, B. & O., and Nickel Plate, which acquisition had been found unlawful by this Commission. Upon the appeal the injunction was ordered vacated, the appellate court being of the view that the contract did not constitute an abandonment within the meaning of the Act because under its terms there was no final and definite relinquishment. Referring to the contention in respect of the Clayton Act the court said (p. 393):

> Nor is there any basis for the injunction in the Clayton Act. All the matters complained of under that Act are subject to the regulation and supervision of the Interstate Commerce Commission and by express terms of the Act, no one, except the United States, is authorized to bring a suit in equity thereunder for injunctive relief, in respect of any matter subject to the regulation and supervision of the Commission. (Section 26, Tit. 15, U. S. C.) If, however, such relief were open to a minority stockholder it would be subject to the ordinary rules of equity and an injunction would not be granted except upon the balancing of relative convenience and injury. Upon that hypothesis it can not be seriously contended that the injunction was warranted. * * * If the contract should be approved by the Commission there will be an administrative determination by

> an expert body entitled to the greatest weight that the arrangement is just and reasonable. * * *

Since, as stated by said Circuit Court of Appeals, no one except the United States is authorized to bring suit in equity for injunctive relief under the Clayton Act in respect to any matter subject to the regulation and supervision of the Commission, it would seem that appellant can not assert said violation of the Clayton Act as ground for injunctive relief in the instant case. Furthermore, the undertaking as a whole has now been approved by the Commission and consequently there exists "an administrative determination by an expert body, entitled to the greatest weight, that the arrangement is just and reasonable."

IV

The Commission's authorization would not be rendered invalid even though appellant should be correct in its contention that the order permits undertakings by Wheeling, for which consent of two-thirds of Wheeling's stockholders is required under Ohio laws

Appellant contends that the Commission's order should be set aside because it authorizes undertakings by Wheeling which could not be carried out under Ohio laws without the approval of two-thirds of its stockholders. In support of this contention appellant cites sections of the Ohio statutes which provide that no railroad shall abandon or extend any part of its road, or change its termini, or give

aid to some other road, or lease, sell or purchase any road, except upon the approval of two-thirds of its stockholders. The plan of Wheeling, so appellant asserts, contemplates a violation of these laws. Wheeling, on the other hand, suggested many reasons why said laws were not applicable to the particular undertaking.

Even if it had been shown in the record before the Commission (which was not the case) that approval by two-thirds vote of Wheeling's stockholders could not be secured for the carrying out of the project under the Commission's authorization, it can hardly be said that the authorization was rendered invalid because conditions were not attached directed toward ensuring regularity of internal corporate procedure, as, for example, the officials of Wheeling must not proceed with the various steps of the enterprise except as duly authorized by vote of stockholders as to such steps for which its charter or by-laws require stockholders' consent. If it should be urged that it was a vain and futile thing for the Commission to authorize an undertaking, some steps of which might require approval of two-thirds of Wheeling's stockholders, unless and until evidence had been produced that such approval had been given, or would be forthcoming, the answer would be, of course, that the Act imposes upon the Commission no duty, before authorizing an undertaking by interstate carriers, to inquire into varying state laws and reach its own determination as to whether each and

every step in the undertaking is inconsistent with the laws of the state under which the carrier is incorporated, or of the states in which it is chartered to do business. That the Commission recognized that no such duty was imposed, or power conferred, upon it is shown by the following statement contained in its report (R. 46):

> While the applicant has answered the allegations of the protestant relating to alleged violations of the laws of Ohio, it contends that we are without jurisdiction to adjudicate those matters and with this contention we agree.

An application was before the Commission, accompanied by a certified copy of resolution of Wheeling's directors authorizing the same to be filed. Certainly the Act contemplated nothing further to give the Commission jurisdiction to act in the premises, for it is beyond dispute that the Commission was right in stating that it is not the body to interpret Ohio laws with a view to determining whether those laws contemplate two-thirds stockholders' approval of the project or of certain portions thereof. It is true that if the carrier is prevented from proceeding with the undertaking, the Commission's assumption of jurisdiction will have served no useful purpose, but such might have resulted even if prior stockholders' consent had been obtained, for the carrier, after securing Commission authority, might have voluntarily decided not to exercise the same.

A like possibility always exists whenever the Commission authorizes undertakings under paragraphs (18) to (20) of Section 1, or issues any permissive order[2] whatsoever. A carrier's existing directorate may change its plans or a new directorate with a different policy may be installed, and, as a result, the authority granted by the Commission may never be exercised.

Unless, therefore, it can be assumed that Congress did impose upon the Commission the duty, before authorizing undertakings by the carriers, of interpreting the varying state laws to determine whether such undertakings, in whole or in some of their features, are such as require corporate authorization in some particular manner, the Commission's jurisdiction to receive and act upon Wheeling's application can not be questioned. Whether a two-thirds stockholders' vote is necessary for the project as a whole, or for certain portions thereof, is a question for the courts in a direct proceeding. Such considerations afford no grounds for an attack upon the validity of the authority as granted by the Commission.

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[2] Examples of other permissive orders are: Authority to consolidate (Sec. 5 (6)) to acquire control of another carrier (Sec. 5 (2)), to pool traffic (Sec. 5 (1)); to issue new securities (Sec. 20a); and to depart from long-and-short-haul provision (Sec. (4)).

V

The statute imposes no duty upon the Commission to fix the price for which property authorized to be abandoned by a carrier shall be sold, particularly where the Commission, after giving full consideration to the plan of the carrier in respect thereof, has found that public convenience and necessity permits of the abandonment

Appellant asserts that the Commission was in error in holding that it was without jurisdiction to fix the sale price for the property which it authorized Wheeling to abandon. In connection with this contention the Commission said in its report (R. 53):

> Paragraph (20) of section 1 of the Act provides that "The commission shall have power to issue such certificate (permitting abandonment) as prayed for, or to refuse to issue it, or to issue it for a portion or portions of the line of railroad * * * and may attach to the issuance of the certificate such terms and conditions as in its judgment the *public convenience and necessity may require.* (Italics ours.)

As heretofore mentioned, this court, in *Colorado v. U. S.,* 271 U. S. 153, involving abandonment of a branch line of railroad, said at page 168, "The sole test prescribed is that abandonment be consistent with public necessity and convenience." The court was there speaking of a balancing of local interests with the interests of the whole public, and said that they must be weighed, the one against the other, and

that "the result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate." Similarly here, even though the public urgently needs better terminal facilities at Cleveland, the carrier's interests must also be looked to, because its continued efficient operation is of concern to the whole public which it serves. The fact that the Commission refused to fix the price for the property to be abandoned does not, of course, show that it failed to give consideration to this feature. In fact the Commission's report affirmatively shows that it gave full consideration to the evidence presented in respect of the value of the property to be abandoned (R. 52–53), as well as to the urgent needs for better terminal facilities at Cleveland, and the result of its weighing of all the evidence before it is expressed in its order granting the certificate, that is, that it considered the undertaking proposed by the carrier to be in the public interest from all standpoints.

VI

Appellant's apprehensions of future possible damage resulting to Wheeling and to itself, as a minority stockholder of Wheeling, are too remote and speculative to afford grounds for injunctive relief

Appellant's asserted standing in court to ask that the Commission's authorization of Wheeling's contract of user in the new station be set aside, rests upon its apprehensions that at some future time the Commission may fix a higher rental, which, Wheel-

ing, having divested itself of its present station, would have to pay or establish a new station in a less favorable locality. If that should be done, appellant contends that as a stockholder of Wheeling, it would suffer damage.

If in the future complaint should be made that Wheeling's contract of user was unduly preferential, the Commission's action thereon would be taken, as it has been here, in the exercise of a sound discretion, and all the matters that have here induced Commission approval would still be available for its consideration. It is true that there might be other circumstances not now foreseeable which would have to be considered. Similarly, changes in circumstances and conditions will have to be considered in any other proceeding affecting Wheeling, and they may be the occasion for reducing its rates or other action bringing about a reduction in its revenues. But such risks are inherent in the ownership of stock in a public service corporation.

This possible damage foreshadowed by appellant seems too remote and speculative to afford grounds for injunctive relief. It is a general principle of equity that in order to justify the remedy of injunction the detriment to be prevented must be reasonably certain and impending. *Am. Coal Min. Co.* v. *Special Coal etc. Com'n.*, 268 Fed. 563 (certiorari denied, 258 U. S. 632); *Farmers' State Bank v. Board of Commissioners*, 295 Fed. 755; *Del., L. & W. R. Co.* v. *Switchmen's Union*, 158 Fed. 541; *Ryan* v. *Williams*, 100 Fed. 172. Compare

United States v. *Los Angeles, etc. R. Co.*, 273 U. S. 299; *Penna. R. R. Co.* v. *U. S. R. R. Labor Board*, 261 U. S. 72; *McChord* v. *Louisville & N. R. Co.*, 183 U. S. 483.

In *Ryan* v. *Williams, supra*, a minority stockholder in a railroad company brought an injunction to prevent its consolidation with another road. The company's charter did not permit of consolidation, but it was alleged that it was defendant's purpose to secure from the state legislature an amendment that would permit of the consolidation, and immediately after the granting of such amendment, to effect the consolidation. The court said (p. 175):

> However apprehensive complainant may be, it does not appear that such an emergency exists as would warrant the court's interposition by the extraordinary remedy of an injunction. If no authority exists to consolidate, and this is conceded, then the merger can not lawfully be entered into; and no damage, certainly irreparable in character, can be sustained by the complainant as the result of the defendants' effort to do a vain thing. To grant an injunction in anticipation of a possible injury to arise under a law that may never be passed is, to say the least, unusual. What complainant's rights may be, and what relief should be afforded him in the event of the passage of such a law as he contemplates, can not now be anticipated: Many questions may, and in all probability will, then arise that are now foreign to this case upon the present condi-

tion of the pleadings. The power of the legislature to act, the effect of the law as passed, the character of the action taken, the competency of those acting, the *bona fides* of the acts performed, and many such like considerations would then have to be taken into consideration.

In the case of *Farmers' State Bank* v. *Board of Commissioners,* 295 Fed. 755, above cited, the court said (p. 757):

> * * * In so far as the application for injunction is concerned, I think it must be said that at the most, the plaintiffs present a case of mere apprehension that the State court may declare the bonds invalid, but from the pleadings and proof it appears that these bonds have hertofore been held valid and as having been issued as provided by the Act cited above.
>
> Of course, courts of equity have afforded injunctive relief where it was made reasonably certain that irreparable injury would be done without the employment of injunction. But the exercise of this power of a court of equity requires caution, deliberation, and sound discretion and is dangerous in a doubtful case. It should not be exercised unless it is shown that injury is impending and threatened and can be averted "only by the protecting preventive process of injunction." *Truly* v. *Wanzer,* 5 Howard (46 U. S.) 142, 12 L. Ed. 88; *Robertson* v. *Montgomery, etc.,* 141 Ala. 348, 351, 37 South. 388, 109 Am. St. Rep. 30, 3 Ann. Cas. 965. But mere apprehension or fear

on the part of the person seeking the relief that action may be brought against him in the future will not warrant injunction nor will equity entertain jurisdiction upon the ground that another court of competent jurisdiction may decide improperly. Furthermore, injunction should never be granted, except in a clear case of irreparable injury, with the full conviction on the part of the court of its urgent necessity. High on Injunction, 81, sec. 64, Volume 1, and page 36, Sec. 22, same volume; 14 R. C. L. 354, Sec. 57, and notes; *Crawford* v. *Bradford,* 23 Fla. 404, 2 South. 782.

CONCLUSION

The decision of the court below dismissing the bill for want of equity should be affirmed.

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APR 7

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 680.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF ON BEHALF OF THE WHEELING AND LAKE ERIE RAILWAY COMPANY, APPELLEE.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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BRIEF ON BEHALF OF THE WHEELING AND LAKE ERIE RAILWAY COMPANY, APPELLEE.

STATEMENT OF THE CASE.

In the view of this appellee, the Statement of the Case contained in appellant's brief contains much that is immaterial and irrelevant to the issues in this proceeding. Appellee therefore makes the following statement of the case:

This case comes to the Supreme Court on appeal from an order of the District Court of the United States for the Northern District of Ohio, Eastern Division (Denison and Hickenlooper, Circuit Judges, and Jones, District Judge), dismissing a bill in equity for a permanent injunction filed

by The Pittsburgh & West Virginia Railway Company against the United States of America (hereinafter referred to as the "United States"), the Interstate Commerce Commission (hereinafter referred to as the "Commission"), The Wheeling and Lake Erie Railway Company (hereinafter referred to as the "Wheeling") and four other corporations—

(a) to enjoin, set aside and annul the certificates of public convenience and necessity issued by the Commission, dated July 9, 1929 (as amended August 8, 1929), in "Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company," Finance Docket No. 7298, and "Abandonment of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Railway Company," Finance Docket No. 7299, which authorize Wheeling—

(1) to operate in passenger and allied services a proposed connecting track and passing siding of The Cleveland Union Terminals Company (hereinafter referred to as "Terminals"); to acquire passenger station facilities and service in the union depot of Terminals; and to operate in passenger and allied services temporarily a portion of an industrial siding track of Wheeling, tracks and station facilities of the Erie Railroad Company (hereinafter referred to as "Erie"), and tracks of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter referred to as "Big Four"), all in the City of Cleveland, Cuyahoga County, Ohio; and

(2) to abandon the portion of its line of railroad lying northerly of Eagle Avenue, including its Ontario Street Passenger Station, all in the City of Cleveland, Ohio.

(b) to enjoin Wheeling from—

(1) abandoning its Ontario Street Passenger Station site in the City of Cleveland, Ohio;

(2) exercising an option which Wheeling has to sell its Ontario Street Passenger Station site to The Cleveland Terminals Building Company (hereinafter referred to as "Building");

(3) performing contracts which it has with Erie and Big Four for the temporary use of the tracks of Erie and Big Four and the temporary use of the passenger station facilities of Erie, all in the City of Cleveland, Ohio;

(4) performing a contract which Wheeling has to operate in passenger and allied services, for a period of one hundred (100) years, a proposed connecting track and passing siding of Terminals, and to acquire for a period of one hundred (100) years passenger station facilities and service in the new union depot of Terminals, all in the City of Cleveland, Ohio.

Wheeling was the applicant in each of said Finance Dockets Nos. 7298 and 7299; Terminals was an intervener therein in support of the applications; and appellant was an intervener therein in opposition to the applications. Appellant is now, and since April 8, 1927, has been, a stockholder of record of Wheeling.

A copy of the report of the Commission in said Finance Dockets Nos. 7298 and 7299 appears at pages 38 to 61 of the record; and a copy of the certificates of public convenience and necessity in said Finance Dockets appears at pages 61 and 62 of the record.

A copy of the opinion and of the decree of the statutory court appears at pages 486 to 497 of the record.

It will appear from an examination of the bill that plaintiff joined two separate causes of action, one against the United States, the Commission, Wheeling, and Terminals for the vacation of the two certificates of convenience and necessity issued by the Commission; the other against Terminals and Wheeling to enjoin Wheeling from abandoning its Ontario Street passenger station site and from

selling the same, and further from performing its contracts for temporary and permanent terminal facilities in Cleveland.

It is our theory that the District Court had jurisdiction to hear and determine both these causes of action, subject to Equity Rule 26 relative to joinder of causes of action. The fact that the statute requires that the cause of action for the vacation of the Commission's certificates be heard by three judges does not seem to prevent three judges from hearing any other causes of action which might be joined with it. It is submitted, however, that this Court's jurisdiction on this direct appeal under Section 47, Title 28, U. S. C., is limited to so much of the decree below as dealt with the plaintiff's cause of action for the vacation of the certificates of the Commission.

The section referred to provides that:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, * * *."

The interlocutory injunction referred to is obviously the interlocutory injunction described in the opening sentence of the section, to-wit:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission * * *."

The section concludes with the provision that upon final hearing "of any suit brought to suspend or set aside, in whole or in part, any order of said commission," the same procedure as to appeal shall apply. Obviously this language does not permit a party to obtain direct review on appeal in this Court of some separate controversy with one of the parties defendant in which the United States

and the Commission have no interest, merely because the liberal provisions of Equity Rule 26 permit a joinder in the District Court.

THE FACTS.

Wheeling is an Ohio railroad corporation, incorporated and organized in December, 1916, and since January 1, 1917, has operated the lines of railroad formerly owned and/or operated by The Wheeling & Lake Erie Railroad Company and its Receiver (R. 220, Ex. 51). These lines are located entirely within the State of Ohio, with an entrance over tracks of another carrier into Wheeling, West Virginia. One of the termini of Wheeling's lines of railroad is the City of Cleveland, Ohio (R. 221; Ex. 1). Wheeling operates into and out of the City of Cleveland a local train service consisting of 2503 regular trains annually plus about 25 excursion trains, the regular trains averaging 3.3 cars per train (R. 221-222, 252). At the time of the filing of the applications in Finance Dockets Nos. 7298 and 7299 these trains operated into and out of Wheeling's down town passenger station, known as its "Ontario Street passenger station" (R. 222-223). This passenger station was located upon a portion of a strip of land 1035 feet in length, in part owned and in part leased by Wheeling, lying northerly of Eagle Avenue, Cleveland, Ohio. The area of the lands owned (hereinafter referred to as "Fee Lands") is about 74,780 square feet, and the area of the leased lands is 5677 square feet. Wheeling's lease of the leased lands expires in April 1991 (Ex. 48, p. 2; Ex. 4). The strip, including the fee and leased lands, abuts on Eagle Avenue, Canal Road, Canal Road Extension (sometimes called "Vinegar Hill"), and Ontario Street, and for many years prior to January 28, 1929 had been occupied by Wheeling's main line track serving its Ontario Street passenger station, and since May 1928 used only in that service (R. 225). On Ex-

hibit 3 the fee lands are shown outlined in yellow, the leased lands are shown outlined in red, and the site of the Ontario Street passenger station is shown outlined in hatching. For some time prior to July 1928 Wheeling's Ontario Street passenger station had been inadequate, obsolete and in need of substantial repairs which could not be made because the City of Cleveland refused to issue a permit for any repairs to the building which would prolong its life (R. 225-230, 270-274; Exs. 5-7).[1]

The annual cost of operation of the Ontario Street passenger station (exclusive of interest, carrying charges, and depreciation on the building, tracks, and land) amount to about $24,000 per year (R. 230; Ex. 8). To construct a new building in its stead would cost about $170,000 (R. 230; Ex. 9), and the estimated operating and carrying charges of this new station and appurtenant tracks (exclusive of interest, carrying charges on land and depreciation on station and tracks) would be about $38,000 per annum (R. 230; Ex. 10).

As passenger station facilities and service were available to Wheeling in the new union depot of Terminals under construction a few hundred feet northerly of the Ontario Street passenger station site, Wheeling entered into a contract with Terminals (Ex. 15) to acquire passenger station facilities and service there for a period of 100 years, and entered into a contract (Ex. 11) with The Cleveland Terminals Building Company (hereinafter referred to as "Building") giving Wheeling the option for a period of five years to sell to Building the fee lands and assign to Building its interest in the leased lands, for a total con-

[1] In view of the unsafe condition of the Ontario Street station Wheeling secured the Interstate Commerce Commission's authority (by Service Order No. 48, issued January 24, 1929) to operate its trains into and out of the Superior Avenue Station of Erie in the City of Cleveland in lieu of the Ontario Street station. On January 28, 1929 Wheeling's officials concluded that it was unsafe to permit the Ontario Street passenger station building to remain standing in its present condition, and acting under a permit secured on that day from the City of Cleveland razed the building.

sideration of $1,600,000 (R. 231-233). The construction of Terminals new union depot is proceeding under a certificate of public convenience and necessity issued by the Interstate Commerce Commission in 1921 in Finance Docket No. 1237 upon application of The New York Central Railroad Company (hereinafter referred to as "Central"), The New York Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate") and the Big Four (Ex. 55). The plan for this union depot provides that the proposed tracks for its east approach shall be constructed across the lands of Wheeling northerly of Eagle Avenue at elevation 52, city datum (R. 231, 232, 246; Ex. 12, 13). Construction of the new union depot was begun in 1922 and is almost completed (R. 261-267; Ex. 56-61). This station will be operated by Terminals which is a union depot company, incorporated and organized under the provisions of Section 9160, *et seq.* of the General Code of Ohio (Ex. 68). The project for the construction of this union depot was an outgrowth of an investigation begun during the World War by the Director General of Railroads. Negotiations or discussions between representatives of the Wheeling and of the Director General for the use of the station by Wheeling, and for the occupancy of Wheeling's lands northerly of Eagle Avenue by Terminals' east approach tracks, began April 1918, and following the termination of Federal Control continued from time to time, first with representatives of Central (one of the so-called proprietary roads of Terminals) and later with representatives of Terminals. Until about the years 1925 and 1926 these negotiations or discussions were conducted upon the assumption that Terminals would require only an easement at elevation 52, city datum, for the location of terminal tracks across Wheeling's lands northerly of Eagle Avenue. The granting of such an easement under the conditions existing prior to that time would have permitted Wheeling

to maintain and operate its tracks and station at a proper clearance across and above the tracks of Terminals. However, after negotiations lasting about two years, the City of Cleveland by ordinance passed October 10, 1927 (Ex. 72) required Terminals to construct a massive concrete bridge or ramp to carry Eagle Avenue from Ontario Street to the Valley of the Cuyahoga River. This so-called "Eagle Avenue Ramp" crosses the southerly boundary of the lands which Wheeling has been authorized to abandon, as well as the proposed east approach tracks to the union depot, at such a grade as to make it impracticable for Wheeling and Terminals to use such lands at the same time with the requisite vertical clearance between their tracks (R. 275-285). This caused a change in the basis of negotiations between Wheeling and Terminals, which thereafter proceeded upon the assumption that Wheeling must be furnished with passenger station facilities and service in the union depot at a fixed compensation, and that it would sell or lease its lands northerly of Eagle Avenue to Terminals or to its nominee instead of granting to Terminals an easement across such lands (R. 285-290). These negotiations having been concluded, the Board of Directors of Wheeling by resolutions adopted July 20, 1928 and November 23, 1928 (R. 233; Ex. 19-28) authorized Wheeling:

> (a) to enter into an agreement with Terminals whereby Terminals would agree to furnish to Wheeling passenger station facilities and service for the period of one hundred (100) years, the compensation for the first twenty-five (25) years to be $20,000 per annum for a normal number of 3,000 trains containing not to exceed 14,000 cars; for the second twenty-five (25) years, upon the same basis subject to adjustment in the event of an increase in the direct cost of furnishing such passenger station facilities and service; and for the last fifty (50) years to be determined by mutual agreement or arbitration;

(b) to enter into a contract with Erie providing for the furnishing of temporary passenger facilities and service to Wheeling at the Superior Avenue station of Erie and the giving of the temporary right to Wheeling to use Erie's tracks to reach said station pending the completion of Terminals' union depot;

(c) to enter into a contract with Big Four providing for the giving to Wheeling of the temporary right to use certain tracks of Big Four to reach said Superior Avenue station;

(d) to enter into a further contract with Terminals providing that Terminals would reimburse Wheeling for the expenses incurred by Wheeling under the temporary contracts with Erie and Big Four;

(e) to enter into a contract with Building giving Wheeling an option for five years to sell to Building Wheeling's fee lands and to assign to Building Wheeling's interest in its leased lands northerly of Eagle Avenue, all for the consideration of $1,600,000;

and to file applications with the Interstate Commerce Commission for the necessary authority to carry into effect the contracts with Terminals, Erie and Big Four and to abandon Wheeling's property northerly of Eagle Avenue.

On December 7, 1928 Wheeling executed the five contracts above described (R. 290).

On December 8, 1928 Wheeling filed with the Commission in Finance Docket 7298 an application (R. 111-156) under paragraphs (18) to (20), inclusive, of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing it:

(a) to operate in passenger and allied services for a period of 100 years a proposed connecting track and passing siding of Terminals;

(b) to acquire for a period of 100 years passenger station facilities and service in the new union depot of Terminals; and

(c) to operate temporarily a portion of an industrial siding track of Wheeling, tracks and station facilities of Erie and tracks of Big Four, all in the City of Cleveland, Ohio.

On the same day it filed with the Commission in Finance Docket No. 7299 an application (R. 176-182) under paragraphs (18) to (20), inclusive, of Section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it to abandon a portion of its line of railroad, including its Ontario Street passenger station, in the City of Cleveland, Ohio.

These applications were assigned for hearing on January 21, 1929 before Examiner T. F. Sullivan. Prior to the hearing appellant filed a petition for leave to intervene in each of these dockets, which was granted by the Commission's order of January 17, 1929. Hearings in this proceeding were held on January 21 to January 24, 1929, and on May 13 to May 18, 1929. At the second hearing Terminals intervened in support of the applications. Testimony was presented by all parties to the proceeding, briefs were filed on behalf of all parties, and the case was orally argued before the full Commission on June 17, 1929. The complete authority sought by Wheeling's application was granted by the certificates issued by the Commission.

For a summary of the evidence justifying the issuance of the certificates by the Commission reference is made to the outline set forth under Point 1 of the Argument, *infra*.

ARGUMENT.

1. THE COMMISSION'S CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is well settled by decisions of this Court that an order of the Interstate Commerce Commission, if supported by substantial evidence, is conclusive, unless some irregularity occurs in the proceedings before the Commission, or unless the Commission exceeded its powers, misapplied the law, or acted so arbitrarily or unreasonably as virtually to transcend the authority conferred upon it.

This statement finds support in the following excerpts from opinions of this Court:

> "The authority conferred upon the Commerce Court by §207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co. v. United States,* 231 U. S. 423, 439; *Manufacturers Ry. Co. v. United States,* 246 U. S. 457, 483, 489. See also *Interstate Commerce Commission v. Illinois Central R. R. Co.,* 215 U. S. 452, 470; *Interstate Commerce Commission v. Union Pacific R. R. Co.,* 222 U. S. 541, 547; *Intermountain Rate Cases,* 234 U. S. 476, 490; *Skinner & Eddy Corporation v. United States,* 249 U. S. 557, 562.
>
> * * * * *
>
> "The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission v. Illinois Central R. R. Co., supra,* 470; *Interstate Commerce Commission v. Union Pacific R. R. Co., supra,* 547;

Kansas City Southern Ry. Co. v. United States, supra, 456; *United States v. Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co. v. United States, supra,* 488."

United States, et al. v. New River Company, et al., 265 U. S. 533, 540, 542.

"The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation v. United States,* 249 U. S. 557, 652; *New England Divisions Case,* 261 U. S. 184, 204. No such irregularity or error is shown."

Western Paper Makers' Chemical Company, et al. v. United States, et al., 271 U. S. 268, 271.

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience,' *Illinois Central R. R. Co. v. Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission v. Union Pacific R. R. Co.,* 222 U. S. 541."

Virginian Railway Company v. United States, et al., 272 U. S. 658, 665-666.

"Second. If the order of the commission be unsupported by the evidence, it is, of course, void. *New England Divisions Case,* 261 U. S. 184, 203. But if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the commission's action. *Id.,* 204; *Virginian Ry. Co. v. United States,* 272 U. S. 658. The order here does not rest alone upon comparisons with the all-rail rates, as seems to be

contended, but is supported by other established facts and circumstances as well. See *Western Chem. Co. v. United States,* 271 U. S. 268, 271. Nothing is to be gained by a review of the evidence. It is enough to say that both the commission and the lower court thought it was ample to justify the order, and, upon a consideration of the entire record, we find no reason to differ with them in that conclusion."

Chicago, Rock Island & Pacific Railway Company, et al. v. United States, et al., 274 U. S. 29, 33-34.

"It is not for courts to weigh the evidence introduced before the Commission, *Western Paper Makers' Chemical Co. v. United States,* 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission v. Illinois Central R. R. Co.,* 215 U. S. 452, 471; *Skinner & Eddy Corporation v. United States,* 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States v. New River Co.,* 265 U. S. 533, 542. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R. R. Co. v. Interstate Commerce Commission,* 206 U. S. 441, 454."

Assigned Car Cases, 274 U. S. 564, 580-581.

While apparently this rule has not been applied by this Court in decisions relating to certificates of public convenience and necessity issued by the Interstate Commerce Commission, it has been recognized by statutory courts in two recent decisions involving such certificates: *Chesapeake & Ohio Railway Company vs. United States, et al.,* 35 Fed. (2nd) 769, 774, and *Piedmont & Northern Railway Company, et al. vs. United States, et al.,* 30 Fed. (2nd) 421, 423 (reversed on other grounds, *Piedmont & Northern Railway Company, et al. vs. United States, et al.,* 280 U. S. . . ., 50 Sup. Ct. 192).

It is submitted that the certificates issued by the Commission in Finance Dockets Nos. 7298 and 7299 are amply

supported by substantial evidence. This evidence may be briefly summarized as follows:

(a) That Wheeling operated into and out of its Ontario Street station in Cleveland 2,503 trains per annum, handling to and from this station annually a total of about 94,000 passengers, express shipments aggregating almost 10,000,000 pounds and United States mail aggregating about 1,200 tons (R. 222-223).

(b) That because of the lack of facilities customarily found at railroad passenger stations, Wheeling's Ontario Street passenger station was inadequate, inconvenient and unsuitable for its passenger traffic and in such poor physical condition as to create a possible hazard (R. 225-230, 270-274; Ex. 5, 6, 7).

(c) That the cost of operating its Ontario Street passenger station, exclusive of depreciation on the station, or interest or carrying charges on the station or land occupied thereby, was approximately $24,000 per annum; and that the cost of operating a new station of the same capacity on the same site would be approximately $38,000 per annum (R. 230, 244; Ex. 8, 9, 10).

(d) That the contract which Wheeling has entered into with Terminals requires Terminals to provide Wheeling with passenger station facilities and service in Terminals' new union depot which are far superior to the passenger station facilities and service heretofore provided by Wheeling at its Ontario Street passenger station in the following respects:

1. That the waiting room, concourses and other public rooms in the union station are much more commodious than in Wheeling's Ontario Street station (R. 238, 239; Ex. 35-41).

2. That the union station is equipped with restaurant, shops, covered taxicab stand, and similar

facilities, all of which were lacking in the Ontario Street Station (R. 239, 227).

3. That Wheeling's patrons may make direct connections with trains of Central, Big Four and Nickel Plate, which number about 98 trains in twenty-four hours, exclusive of extra sections; and with the rapid transit trains serving the Heights section of Cleveland, which number about 89 trains in 24 hours (R. 240-242, 480; Ex. 153).

4. That Wheeling's patrons may go directly by underground passageways into the buildings constituting a part of the Terminal development, including the Terminal Tower Building, Hotel Cleveland, Medical Arts Building, Builders Exchange Building and Public Garage (all of which are either wholly or partly completed) and a projected department store (R. 242-243).

5. That, on the average, Wheeling's patrons will be brought about 500 feet nearer to the principal buildings in downtown Cleveland, including the principal hotels, banks, business buildings and theaters; and several hundred feet nearer to the loading points of the principal street car and motor bus lines serving downtown Cleveland (R. 243, 255-261; Ex. 12, 53, 54).

(e) That the Superior Avenue station of Erie, where Wheeling is to be furnished with passenger station facilities free of cost pending the opening of the union depot of Terminals, is more adequate and suitable for Wheeling's patrons than was the Ontario Street passenger station (R. 234-237; Ex. 32).

(f) That if Wheeling is furnished with passenger station facilities and service in the union depot of Terminals it will no longer require its lands northerly

of Eagle Avenue, and can dispose of these lands for $1,600,000 to Building, which has contracted to provide Terminals with an easement thereover for the easterly approach of the Union Terminal. That it is impracticable for Wheeling and Terminals to occupy these lands at the same time (R. 231, 245, 248; Ex. 11, 42, 43).

(g) That the contracts between Wheeling, on the one hand, and Terminals, Building, Erie and Big Four, on the other hand, are highly advantageous to Wheeling. The compensation which Wheeling will pay Terminals for such passenger station facilities and service is substantially less than the cost to Wheeling to provide its own passenger station facilities and service in its Ontario Street passenger station, or in any station which it might build in lieu thereof; and the net proceeds of the sale of the land (which will amount to about $1,500,000) will be available for additions and betterments to Wheeling's railroad, which will yield to Wheeling at least six or seven per cent per annum (R. 244-245).

(h) That the compensation which Wheeling will pay Terminals for such passenger station facilities and service is in excess of the out-of-pocket cost to Terminals of furnishing such facilities and service. (R. 388).

(i) The substitution of passenger station facilities and service in the new union depot for passenger station facilities and service in the Ontario Street station will tend to retain to the Wheeling a considerable amount of passenger traffic which otherwise might be lost to it (R. 246).

(j) The convenience and necessity of the members of the public other than Wheeling's patrons, who will use the union station of Terminals, justified the issuance of the certificates of public convenience and

necessity as a necessary step to the completion and opening for operation of the union station of Terminals (R. 261-267, 395-404).

(k) If Terminals is required to construct its tracks below the existing tracks of Wheeling at a depth sufficient to provide legal clearance, the grade of Terminals tracks in the union station and throughout the east approach will be dangerous and difficult of operation (R. 295-308; Ex. 78, 79, 80).

(l) The value of Wheeling's interest in lands proposed to be conveyed to Building does not exceed $1,600,000 (R. 404-478; Ex. 148, 149, 150).

The lands of the Wheeling northerly of Eagle Avenue consist of a long narrow strip on a side hill east of the Terminal area which does not partake of the values of the high-grade retail business properties on the east side of Ontario Street or near the Public Square. These lands are available for only limited uses and immediately behind them lies a large "dead" area productive of no buying power. Recent purchases of property along Ontario Street, and the asking prices of properties for sale in the immediate vicinity, indicate that the option price of $1,600,000 is more than ample consideration for the Wheeling's interest in these lands. Appraisals of the Wheeling's present interest in these lands by four experienced real estate men, well informed as to the values of lands in this vicinity, range from $700,023 to $877,473.

(m) The directors who authorized the filing of the applications were lawfully elected at the annual meetings of Wheeling's stockholders on May 25, 1927 and May 23, 1928; or, if not lawfully elected at such meetings, held office by reason of their prior elections (R. 479-480; Ex. 88, 91, 151, 152).

Moreover, it is submitted appellant is foreclosed to urge that the record is wanting in substantial evidence to support the Commission's findings that public convenience and necessity require or permit the operation and abandonment sought by Wheeling in Finance Dockets Nos. 7298 and 7299. In the whole gamut of allegations in Sections XLVII to LIII of the amended bill (R. 27-36) there is not one which can be construed to mean that the Commission was without substantial evidence for its ultimate finding of public convenience and necessity. Consequently, Point XV in appellant's Statement of Points to be Relied Upon lies without the scope of the amended bill of complaint, and, with its elaboration at pages 136 to 145 of appellant's brief, should be disregarded by this Court.

Nor does appellant's Statement of Points to be Relied Upon contain any claim that any irregularity occurred in the proceedings before the Commission. Thus limited by the scope of the bill and of the Statement of Points, appellant is remitted to its claims that the action of the Commission was without warrant in law, contrary to law, and arbitrary. The following sections of this brief are devoted to a discussion of these claims.

2. TERMINALS IS NOT A COMMON CARRIER.

Appellant's argument that the admitted benefits of the user contract to Wheeling and to the public using its passenger service to and from Cleveland are illusory because the contract is so favorable to Wheeling as to be an illegal discrimination against the other carriers using the station, and, hence void and not enforcible, is predicated upon the assertion that Terminals is a common carrier. While, as will hereinafter appear, we contend that even if this premise were true, the user contract would, nevertheless, be valid, we think that the whole contention can be summarily disposed of by an examination of the question whether Ter-

minals is a common carrier. For, if it should appear that Terminals is not a common carrier, but is on the contrary a mere instrumentality to which common carriers will delegate by private contract the performance of a fraction of the duty which the carriers owe the public, then the whole argument that the user contract is void fails.

Terminals is a corporation, organized and existing under the provisions of Title IX, Division II, Subdivision II, Chapter 1, Sections 9160 to 9169, inclusive, of the General Code of Ohio. Subdivision II is entitled "Public Service Corporations Other Than Railroads."

The first chapter of the subdivision deals with Union Depot Companies. Section 9160 reads as follows:

> "*Articles of incorporation, powers under.*—The presidents of two or more railroad companies running railroads to the same city, or village, by the consent and under the direction of their respective boards of directors, or any number of persons, not less than five, a majority of whom shall be residents of this state, may file articles of incorporation in the office of the secretary of state for the purpose of purchasing or leasing depot grounds, and locating, constructing and maintaining a common or union station house, passenger or freight depot, or both, and terminal and connecting tracks for the use of steam railroads, or of both steam and electric railroads. Such company may acquire such depot grounds, structures, terminal and connecting tracks, by lease or otherwise. Such company may also acquire, by lease, purchase or otherwise, and may construct, maintain and operate in connection with its terminals and station, a terminal railroad with two or more tracks connecting the railroads of one or more companies, and may also construct and maintain warehouses, stores, office buildings, hotels and other structures for the accommodation of the public, and may operate or lease said depot grounds, union station house, passenger or freight depot, tracks, terminal railroad, warehouses, stores, office buildings, hotels or other structures, or any part thereof."

While it appears from the section that, as an incident to the union depot, the company organized under the chapter may have terminal and connecting tracks, yet it is apparent that the Legislature of Ohio did not regard a Union Depot Company, such as Terminals, as a railroad, because the statutes relating to railroads are found in Subdivision I of Division II of Title IX, whereas the statute relating to Union Depot Companies is arranged as Chapter 1 of Subdivision II, which is devoted to public service corporations other than railroads.

The statute under which Terminals is organized is somewhat unusual because it contemplates that the proprietors of a Union Depot Company should be railroad corporations. The Act originally provided that the Articles of Incorporation for such a company should be filed by the presidents of two or more railroad companies running railroads to the same city or village by the consent and under the direction of their respective boards of directors. (R. S. 3446). Later the statute was amended to permit the filing of such articles "by any number of persons, not less than five * * *." 101 O. L. 171.

Terminals is engaged in building and has nearly completed a union passenger terminal in the City of Cleveland, pursuant to a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission on the 6th day of December, 1921, in Finance Docket No. 1237 (Ex. 55) to the New York Central Railroad Company, The Cleveland, Chicago and St. Louis Railway Company and The New York, Chicago and St. Louis Railroad Company, which companies own all the stock of Terminals. The three railroads last mentioned will be referred to collectively as "Proprietary Lines."

The certificate read in part:

"*It is further ordered,* that said New York Central Railroad Company, Cleveland, Cincinnati, Chicago &

St. Louis Railway Company, and New York, Chicago & St. Louis Railroad Company be, and they are hereby, authorized to construct and operate said line of railroad and terminal station, by and through control of, and contract, with, the Cleveland Union Terminals Company, in the manner described in said applications and report."

It is perfectly apparent that the Proprietary Lines could have acquired lands as tenants in common in the City of Cleveland and built thereon a passenger station for their joint use and could have jointly employed the necessary staff to operate it without having incorporated Terminals at all. And, having completed such a Union Station, they might have jointly contracted with other carriers to admit the trains of such carriers into the Union Station. The practical convenience, however, of forming a separate corporation to build and operate the Union Station, which could be controlled through the ownership of stock by the Proprietary Lines, is, of course, obvious. In awarding to the Proprietary Lines the Certificate of Public Convenience and Necessity to build the Union Station under the provisions of paragraph (18) of Section 1, Chapter I, Title 49, United States Code, the Commission recognized the plain fact that the "carriers" by which the Union Station, with its terminal tracks, was to be controlled, and which would engage in transportation through the Union Station and over its terminal tracks, were the Proprietary Lines and not their joint instrumentality.

This Court has had occasion to hold that a terminal railroad company, all of whose stock was held by other carriers, is not itself an independent carrier. *Chicago, Milwaukee & St. Paul Railway Co., et al. v. Minneapolis Civic Association,* 247 U. S. 490. The opinion says (p. 498):

"* * * It is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company (the Terminal Road) is an independent pub-

lic carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public."

The conception of Terminals as a common carrier prospers only when it is at large in the realm of generality. It cannot be reduced to the concrete. All the difficulties inherent in it are disclosed by the question "carrier of what?"

The Interstate Commerce Act deals with two kinds of common carriers by railroad—i. e. carriers of passengers and carriers of property.

(a) Is Terminals a Carrier of Passengers?

In addition to its Union Station proper, Terminals will own and operate an east and west approach. The former begins at East 37th Street in Cleveland and runs into the station a distance of about two miles; the latter extends from the station to West 40th Street in Cleveland, a distance of about two and one-fourth miles (R. 393). We do not dispute that Terminals might act as a common carrier of passengers between East 37th Street and West 40th Street. It might sell tickets and transport local passengers between these and intermediate points in Cleveland. Further it might contract with through passengers for transportation for such part of their journey as lies between its termini. For instance a passenger desiring to travel from New York to Chicago might contract with the New York Central Railroad for transportation from the Grand Central Station in New York City to East 37th Street in Cleveland; with Terminals from East 37th to West 40th Street; and again with the New York Central from West 40th Street to the La Salle Street Station in Chicago. The New York Central and Terminals might adopt the familiar through route and joint fare for the convenience of the

passenger and issue him a through ticket in which the terminal limitation of each carrier's obligations would be defined.

If Terminals proposed to carry on such a business it would unquestionably be a common carrier of passengers, but an examination of the Union Passenger Terminal Agreement between Terminals and its Proprietary Lines (Ex. 69), and of the proposed User Contract between Terminals and the Wheeling (Ex. 15), will show that Terminals proposes to carry on its business along entirely different lines. It has no contractual relations with passengers on trains running from its approaches and into its station whatever. It does not participate in any way in the fares that such passengers will pay to the carriers with whom they contract. It has contracted with the Proprietary Lines and with Wheeling to extend its facilities to their trains and their passengers and it will receive a compensation without respect to the number of passengers using the car or train, the fares they pay or the distance they propose to travel.

It is submitted that a passenger on a New York Central train who is damaged in mind, body or estate by reason of the negligence of the crew of one of Terminals' locomotives hauling the train into the Terminals' area, could maintain no action *ex contractu* against Terminals although he might well maintain an action *ex delicto*. On the other hand he might maintain an action either *ex contractu* or *ex delicto* against the New York Central because of the act or omission—either tortious or in violation of the terms of the New York Central contract—of the agent of Terminals which was in turn the agent of the New York Central.

The fact that one of the Proprietary Lines or Wheeling has delegated, by special contract to Terminals, the performance of a portion of the duty which the carrier owes to its passengers, no more makes Terminals a common carrier

of passengers than a similar delegation makes a locomotive engineer, or an electric power company supplying power for the propulsion of the train, a common carrier.

In *United States, ex rel. Refrigerator Company v. Interstate Commerce Commission,* 265 U. S. 292, this Court held that a company owning a large number of refrigerator cars which were operated over various railroads under contracts with the railroad companies, and which received from shippers no compensation for the use of its cars, but was paid wholly by the railroad companies, is not a common carrier within the meaning of Section 209 of the Transportation Act of 1920 which guaranteed to "a carrier by railroad * * * whose railroad or system of transportation is under Federal control at the time Federal control terminates" that its railway operating income should not be less than a prescribed minimum for a period of six months after the termination of Federal control. The Court said at page 296:

> "It is enough to say, that under the facts the Car Company is not a carrier by railroad, or, indeed, a common carrier at all, within the ordinary acceptation of the words."

The opinion further says:

> "The income arises not from operating a railway but from the use of facilities let to the railway companies for fixed compensation * * *. In pursuance of the contracts the cars were delivered to, operated and controlled and their use as instrumentalities of transportation paid for, by the railroads. This is enough to establish a letting for hire * * *."

In *Ellis v. Interstate Commerce Commission,* 237 U. S. 434, this Court held that the Armour Car Lines, a corporation which owned, maintained and let to railroads or shippers refrigerator, tank and box cars and which also iced its refrigerator cars from icing stations maintained along

the various lines of railway, was not a common carrier (p. 443) notwithstanding that its cars were instrumentalities used in transportation.

It is apparent, we submit, that an examination of the method by which Terminals proposes to do its business forbids the conclusion that it will be a common carrier of passengers. It may be that a court would disregard a business method fraudulently interposed between a common carrier in fact and the public, in order to deprive the public of the benefits and protection that the law gives it in its dealings with common carriers, but we have no such case here. Terminals is the agent of responsible common carriers who can be required to afford the public every protection to which it is by law entitled. The contracts between Terminals on the one hand and its Proprietary Lines and Wheeling on the other are not devised to conceal the facts, but on the other hand honestly to set forth the real nature of the business in which Terminals proposes to engage. There is, therefore, no reason why the Court should not take them for what they appear to be—an accurate definition of the business in which Terminals proposes to engage.

(b) Is Terminals a Carrier of Property?

An examination of the contract between Terminals on the one hand and its Proprietary Lines and Wheeling on the other, will show that it is proposed that the electric locomotives of Terminals will haul the trains of the various carriers using the Union Station between the various points where each of the carrier's lines intersect Terminal's approach tracks and the Union Station. If Terminals is a common carrier of property, it is a common carrier of a different kind of property from that carried by any carrier who was ever held to be a common carrier—it is a common carrier of the trains of other common carriers.

An attempt to superimpose the relation of shipper and carrier upon an existing relation of the same kind was made in this Court upon more plausible ground in the *Express Cases,* 117 U. S. 1. It was held in that case that an express company which had contracted with a railroad for the transportation on its trains of the express company's messenger and the packages under his charge was not entitled to a mandatory injunction requiring the railroad to continue to furnish transportation after the expiration of the contract. This Court heard on appeal three different cases of substantially similar nature, in which Mr. Justice Miller had issued injunctions on circuit. It was admitted, of course, that the express companies were common carriers of the parcels which they were transporting for the shippers. It was admitted further that the railroad companies were common carriers so far as their passenger and general freight business was concerned. It was the theory of the express companies that the railroads were likewise common carriers of the parcels which the public had committed to them for shipment by express. It was further contended that upon the expiration of the contract, the express company was entitled to receive substantially similar service upon payment of a reasonable compensation to be fixed by the court.

It seemed to Mr. Justice Miller that these contentions of the express companies were correct, and decrees were accordingly entered below requiring the railroads to provide the customary facilities to the plaintiff companies upon the payment of reasonable charges fixed by the decrees. But a majority of this Court were of the contrary opinion, and the decrees entered below were reversed and remanded with the directions to dissolve the injunction, and, after an adjustment of accounts for the period in which the injunctions were in force, to dismiss the bills.

In the decree below, it was found (page 16):

> "VII. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains."

It was further decreed below (page 17), that the express companies' messengers and express matter should be transported upon the payment of a rate "not exceeding the rate at which it (defendant) may itself transport express matter on its own account or for any other Express Company or for any other corporation or private individuals."

There can be no doubt, therefore, that the Circuit Court held that the railroad company was a common carrier of express companies. The opinion of this Court was written by Chief Justice Waite who stated the question before the Court to be whether it was the duty of the railroad company "to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company." (page 20)

That this Court was fully conscious of the implication of the question is indicated by the following language from Mr. Chief Justice Waite's opinion (page 21):

> "But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers."

It was considered by the Court to be a contradiction of the contention that a railroad company was a common

carrier of express companies that the relations between railroads and express companies had always been the subject of special contracts.

> "On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned." (page 21)

In our case also it appears that the Terminals' relations with every carrier which will use the station has been by special contract, i. e., its relations with the Proprietary Lines by the Union Passenger Terminal Agreement, (Exhibit 69) and its relations with Wheeling by the user contract. It also appears of record that the services which Terminals will render to the various carriers using its facilities varies widely in nature and quantity and in the kind of traffic to which it is applied.

We apologize for the fact that the essential differences between the Wheeling passenger traffic in and out of Cleveland and the traffic of the Proprietary Lines is not more clearly disclosed upon the record. The claim now made by appellant that the user contract was so favorable to Wheeling as to be discriminatory against other carriers was not made in the appellant's intervening petition before the Commission (R. 200). On the contrary, it was averred in appellant's supplemental intervening petition that our execution of the user contract was "an attempt upon the part of B. & O., Central and Nickel Plate to force applicant to use the facilities of Terminals and thereby

contribute to the excessive cost of erecting, maintaining and operating Terminals' railroad and union depot" (R. 204). This petition was filed on the 21st day of January, 1929. The hearing was adjourned January 24, 1929, to permit the Commission to review certain rulings of the examiner excluding evidence offered by intervener. The Commission having sustained the intervener's contention in respect to the admissibility of evidence, the hearings were resumed May 13, 1929. At the adjourned hearings the appellant for the first time disclosed its contention that the terms of the user contract were so favorable to Wheeling as to be discriminatory against other carriers using the station. We charge the fact to be that appellant's contention in this respect is an after-thought and advanced by appellant only when it realized that its original contention that the terms of the user contract were oppressive to Wheeling had wholly collapsed.

But enough evidence was introduced in the record for other purposes to show that Wheeling passenger traffic in and out of Cleveland was of a radically different kind than that of the Proprietary Lines. Mr. Durham, the Vice President and General Manager of Wheeling, testified (R. 221, *et seq.*) that Wheeling operates four passenger trains into Cleveland daily and three on Sunday, and that it operates three outbound trains daily. These trains are of two, three and four cars each. They average 3.3 cars per train. It further appears (R. 223) that Wheeling's outbound passenger revenues at its old downtown station declined from $130,589.69 in 1923 to $82,030.83 in 1928, due principally to motor vehicle competition (R. 224). It likewise appears from the testimony of Mr. Duncan, Chairman and President of the Wheeling (R. 277), that the average haul of Wheeling passengers at that time (1920) was probably "less than fifty miles."

Referring to the testimony of W. F. Schaff, the Assistant General Manager of the New York Central Lines West of Buffalo, it appears that the Proprietary Lines will operate 115 trains of an average in excess of nine cars each into or out of the station per day (R. 306, Ex. 120). The character of the passenger traffic of the Proprietary Lines is indicated (R. 240-242) by the fact that their trains run between Cleveland and such cities as Chicago, Detroit, Indianapolis, St. Louis, Columbus, Cincinnati, Buffalo, New York and Boston, and by the statement of Mr. Schaff that every night between the hours of 8:30 and 9:15, it will be necessary to park in the Terminal from 34 to 53 sleepers to take on passengers at Cleveland for movement on night trains (R. 306). To sum the matter up, the Wheeling does a declining short haul passenger business in and out of Cleveland, consisting of three or four trains per day each way of an average length of about three cars, whereas the Proprietary Lines run 115 trains per day of an average length in excess of nine cars in long haul service.

Furthermore, there is a striking difference in the amount of service to be rendered Wheeling trains, and the trains the Proprietary Lines will receive. Terminal's electric locomotives will haul Wheeling trains a distance of about two thousand feet in either direction (R. 391). On the other hand, the New York Central trains will be hauled from Collinwood on the east to and through the Union Station to Linndale on the west, a total of from 16 to 18 miles. The Big Four trains will be handled from Linndale to the Union Depot, a distance of six or seven miles, and a like distance outbound. The Nickel Plate trains will be hauled by Terminals from a point about two and a half to three miles east of the station to a point about two and a quarter miles west of the station. The Proprietary Lines will pay Terminals on one basis for so much of the haul as is on Terminals' tracks, and on a different basis for the haul by

Terminals' electric locomotives over their own tracks (R. 393).

It seems, therefore, that Terminals' services are to be rendered to carriers each of whom requires a different amount of service, and between whose businesses there are wide generic differences. It seems to us that the term "common carrier" necessarily implies a person who is serving a group, or groups of people requiring the same kind of service in the same or readily commensurable quantities. The conception breaks down as applied to a person rendering service to a group of patrons each of whom requires a service different in kind and quantity from that furnished the others, and incapable of comparison with reasonable precision. In other words, we submit the reasons given by this Court in the *Express Cases, supra,* why the relation of common carriers and shippers could not conveniently be established between a railroad and express companies desiring to use its trains are applicable even more strongly to the contention that Terminals will be a common carrier of the railroads whose trains make use of its facilities.

A pertinent case is that of *Central Railroad and Banking Company v. Lampley,* 76 Ala. 357. The defendant was a common carrier by railroad with a line running from Clayton to Eufaula. As an incident to its general railroad business it had a contract with the government for the hauling of mails between those points. The plaintiff sent a package of money by registered mail to an addressee in Eufaula. The package was shown to have been enclosed in a mail pouch and delivered by the postoffice at Clayton to an agent of the defendant. The plaintiff offered proof tending to show that the package containing the plaintiff's money was not in the mail pouch when opened in the Eufaula postoffice. There was no proof offered to show that it had been appropriated by the railroad to its own use or

that it had been lost or stolen by any negligent act or omission of the defendant, the plaintiff resting its case on the mere fact that the money had been delivered to the railroad company at Clayton and had not been surrendered by it to the Postmaster at Eufaula.

The plaintiff contended that because the defendant was a common carrier, the mere failure to deliver fixed its liability. The Supreme Court of Alabama, however, reversing a judgment for the plaintiff, held that the defendant was not a common carrier of the mails which it was carrying under contract with the government, and that in the absence of negligence or actual conversion it was not liable. The opinion said in part (pp. 364-365):

> "A common carrier, as generally defined, is one whose usual or regular business is the transportation, for reward, of goods from one place to another, for such persons as choose to employ him. To originate the exceptional liability of the common law, although founded on reasons of public policy, and to create the relation, there must exist privity of contract, express or implied, and a title to compensation for the services * * *. Between a contractor for carrying the public mails, and the sender of letters, there is no privity of contract, and the contractor has no right to, and receives no remuneration from the sender. The government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the government, and by it his compensation is paid. He owes a duty, not to the sender of letters as an individual, but to the integral public, springing from his agreement to carry the mails * * *.
>
> The railroad company was not transformed into a common carrier *as to the mails*, because, being engaged at the regular business of transporting goods for the public, it was, at the same time, carrying the mails by direction and employment of the proper department of the government. The occupation of the

company was of a dual character. It was acting in two capacities, created and regulated by separate and distinct contracts and employments. The liability of the defendant cannot therefore be determined by the rules governing the responsibility of a common carrier." (Italics ours).

It should be pointed out that whatever color appellant's contention that Terminals will be a common carrier has, is given by the circumstance that over its own tracks —and for some distance beyond them in the case of trains of Proprietary Lines—it will use its own electric locomotives to haul trains. This fact, of course, is not essential to its business of providing a union station. The Court can take judicial notice of the fact that most union station companies do not provide such service. The roads proposing to use the Terminals' new station are steam railroads. The advantages of using electric locomotives to a union depot which proposes to develop its air rights and adjacent territories for office buildings, hotels and retail stores, are obvious. It is also obvious that the convenient way of securing electric propulsion of the trains entering and leaving the station was for Terminals to furnish and operate the locomotives rather than for four or five different railroads each to acquire electric motive power to be operated over the same tracks.

It seems clear that the hauling of trains is merely an incident of Terminals' business as the owner and operator of a union station and is not of its essence. It is illogical, we submit, in determining whether Terminals is a common carrier, to overlook its essential functions and to stress the merely fortuitous.

That Terminals is not a common carrier of property is likewise indicated by the manner in which it moves the passenger trains and passenger train cars of its tenant lines. It is obvious that it handles these trains and cars

as instruments or facilities of commerce rather than as articles of freight consigned from one point to another. Passenger cars are often shipped from the point of manufacture over lines of a carrier or carriers having no interest in them under bills of lading, and when so shipped are handled by such carriers as any other article of freight consigned from one point to another. On the other hand, railroads sometimes rent from other railroads passenger cars for use in transporting passengers and while such cars are upon the lines of the leasing railroad they are not handled as articles of freight but as instrumentalities of commerce. In the case of the cars shipped as articles of freight the charges must be made upon the basis of the applicable tariffs; in the other case the rental for the use of such cars is a matter of private contract.

The Commission has often recognized the distinction between the movement of cars as articles of freight and their movement as instruments or facilities of commerce. Thus in the case of *Pacific Engineering & Construction Company v. Chicago, Rock Island & Pacific Railway Company et al.*, 56 I. C. C. 247, which involved the question of whether cars were transported as articles of freight or transported as facilities of commerce, the Commission said (248-249):

> "The complaints and evidence are not directed to the amount of the charge assailed, but to the imposition of any charges as unreasonable in view of the use of the cars as transportation vehicles and the derivation of the same revenue from their lading as would have been obtained if the carriers' own equipment had been used.
>
> "A conclusion contrary to the complainants' contentions seems to us to have the better support. The cars were delivered to the carriers as articles, rather than as instruments of commerce, for transportation to particular destinations."
>
> * * * * *

"While it is the duty of all common carriers subject to the act to furnish suitable and adequate facilities for all reasonable necessities of the business in which they engage, they are at liberty to choose their own appropriate means of carriage. *Worcester Excursion Car Co. v. Penn. R. R. Co.*, 3 I. C. C. 577. They are not common carriers of cars of other ownership employed solely as instruments of carriage, and may decline to accept them for such purposes in lieu of their own, although bound to accept them when offered merely as articles to be transported."

See also, *McCloud River Railway Company v. Southern Pacific Company et al.*, 56 I. C. C. 287.

Something is sought to be made by appellant of the ordinance of the City of Cleveland No. 47814 (Exhibit 110) accepted by Terminals and the Proprietary Lines, whereby Terminals and the Proprietary Lines undertook to furnish station facilities within the limits of Terminals' capacity to all the railroads entering Cleveland. The ordinance recites that the principal Proprietary Lines, i. e., the New York Central and the Big Four, were already under contract with the City to build a union passenger depot on the lake front from which contract, obviously, they had to be released by the City before they could undertake the present project. It further appears from the ordinance that Terminals' station and approaches could not be completed without vacating some streets and relocating others, all of which required the consent of the City. The City was therefore in a position to impose upon Terminals and the Proprietary Lines obligations which would not otherwise have existed. It took advantage of the opportunity to provide for the admission of other railroads to the Terminal Station. These provisions are found in Section 91-3 of the ordinance which provides that to the extent of the capacity of Terminals' facilities it shall accommodate the trains of other railroads whose tracks may cross, connect or inter-

sect the tracks of Terminals "upon such terms, conditions, and for such consideration as shall be mutually agreed upon with said steam, interurban or suburban railroad, and said Terminals Company." In other words, that the terms upon which another road might be admitted should be the subject of a special contract between such road and Terminals.

The ordinance then provides that in the event that no agreement can be made with such other road, the terms shall be fixed by three arbitrators whose award shall provide for compensation to Terminals "upon fair and reasonable terms and conditions, and for a fair and reasonable consideration, which shall be based upon the cost, maintenance and operation of such facility, without regard to its use by any other railroad or railway company, and *with due consideration for the fact that such steam, interurban or suburban railroad company did not assume initially any portion of the investment, hazard or liability.*" (Emphasis ours). In other words, Terminals will have the right to insist upon being compensated not only for the physical property to be used by the tenant carrier and the service to be rendered it, but an additional compensation for whatever hazards have successfully been overcome and liabilities incurred in the initial construction.

The essential fact of the ordinance is that Terminals and the using company are entirely free to make such contract as they may agree upon (as Terminals and Wheeling have done), and that it is only upon failure to reach an agreement that the provisions for an arbitration become effective. There is no shadow of a suggestion that in making agreements for the use of its facilities Terminals must accord equal treatment to all tenant lines.

Furthermore, the ordinance recognizes that Terminals' enterprise is subject to hazards before it can be completed and that such hazards when overcome are the basis for an additional compensation to Terminals by the future tenant carriers.

An obvious hazard to Terminals' enterprise was the fact that Wheeling's downtown station site lay across the throat of the eastern entrance to Terminals' station. This property being already devoted to the public use was probably not subject to appropriation by Terminals, and could only be acquired if the Interstate Commerce Commission consented that Wheeling abandon the property as part of its railroad. Obviously, Wheeling would not seek, and the Commission would not permit, such abandonment unless Wheeling secured other passenger station facilities at a cost which did not unduly burden its passenger service. We have, therefore, a hazard now overcome by Terminals, the cost of which can be fairly charged pro rata to roads who may in the future become Terminals' tenants under the very provisions of the ordinance.

The argument that the initiated ordinance in any sense prohibits the proposed user contract with Wheeling will not survive a reading of its terms. But after all, the City of Cleveland is not in this action trying to enforce its ordinance nor is any railroad seeking a specific performance of a covenant made by the City of Cleveland in the ordinance for its benefit. Whatever the City of Cleveland did or attempted to do, it could not and cannot determine by ordinance or otherwise whether Terminals is a common carrier at common law or under the Interstate Commerce Act. The whole subject of the ordinance may be dropped with the additional observation that if the City of Cleveland had supposed that Terminals would be a common carrier of railroads obligated within the limits of its capacity to extend its facilities on equal and reasonable terms to all railroads that might desire to use them, it would never have bothered to write Section 91-3 into the ordinance.

The contention that Terminals has held itself out as a common carrier of railroad companies by its contract with

the Proprietary Lines (Exhibit 69) is sufficiently answered by the quotation of Article III of that contract (p. 21):

> "Section 1. The Terminals Company shall at all times have the right to admit other steam railroads entering the City of Cleveland to the use of the Passenger Terminal or parts thereof, as tenants, *upon terms and conditions to be agreed upon between the Terminals Company and such tenants, and approved by the railroads.*" (Emphasis ours).

3. TERMINALS IS NOT REQUIRED TO FILE TARIFFS.

The absurdity of appellant's claim that Terminals is a common carrier and is subject to the obligations imposed upon common carriers by Title 49, U. S. C., becomes apparent when it argues under Point 1-C of its brief, (pages 46-53), that Terminals must file tariffs with the Interstate Commerce Commission and must not depart therefrom in its charges against its tenant lines. In developing this argument appellant quotes paragraph (7) of Section 6, Title 49, U. S. C., which forbids a common carrier from engaging or participating in the transportation of passengers or property "unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published *in accordance with the provisions of this chapter*" (italics ours); but omits paragraph (1) of Section 6, which contains the provisions of the chapter as to the filing and publishing of tariffs. These provisions are as follows:

> "Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and

joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Title 49, U. S. C., Sec. 6, par. (1).

It is apparent from a casual reading of this paragraph that it is plainly inapplicable to a union depot company. It is not operating a "route" for the movement of passengers or property. There are no "points" between which it assumes to transport passengers or property. As indicated by the third sentence of paragraph (1), the word "points" means "places between which property and passengers will be carried"; implying that the carrier must have on its "route" two or more stations or stopping places for the receipt and delivery of passengers and property.

This condition does not obtain in the case of a union depot company, for it has no route. It has no points or places between which property and passengers will be carried save its single depot, to and from which passengers are carried by its tenant lines under the passengers' contracts with those lines and in their equipment.

Plainly, paragraph (1) of Section 6 lays no duty upon Terminals to publish and file tariffs with the Interstate Commerce Commission; hence paragraph (7) of the same section cannot apply.

If Terminals is a common carrier, a method of providing the Commission with information as to its contracts with its tenant lines is prescribed in paragraph (5) of Section 6 of Title 49, U. S. C., which provides that:

> "Every common carrier subject to this chapter shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party."

The same reasoning disposes of appellant's contention that the Ohio General Code requires Terminals to publish and file schedules of its rates, fares and charges with the Public Utilities Commission of Ohio. This requirement is laid upon railroads by Section 505 of the Code, quoted at page 52 of appellant's brief. It requires each railroad to print and file with the Commission schedules "showing all rates, fares and charges * * * between all points in this state upon its line, or any line controlled or operated by it."

Section 506 of the General Code provides in part that "the schedules shall plainly state the places upon the line of such railroad or upon any line controlled or operated by it in this state between which passengers and property will be carried * * *."

As in the case of the tariff requirements of the Interstate Commerce Act, Section 505 contemplates a roadhaul

service between various points in the state located upon a line of railroad. Unless Terminals offers to the public a transportation service between points—that is places for the receipt and delivery of passengers or property—Terminals, even if a common carrier, is not subject to Section 505 of the Code. If Section 505 is inapplicable, Section 510 (quoted at page 52 of appellant's brief) requiring that a carrier's charges must conform to its schedules, is likewise inapplicable.

And the Ohio General Code contains a provision corresponding to paragraph (5) of Section 6, Title 49, U. S. C., expressly providing for the filing with the Public Utilities Commission of Ohio of contracts between railroads and a union depot company for the use of a depot. This section (561) reads as follows:

> "When required by the commission and within a time fixed by it, each railroad shall deliver to the commission for its use copies of all contracts which relate to the transportation of persons or property or any service in connection therewith, made or entered into by such railroad with any other railroad, terminal, depot, car or equipment company, express or other transportation company, bridge company, or any shipper or shippers, producers or consumers or other person or persons doing business with it."

This section indicates that the General Assembly of Ohio intended that such matters should be covered by special contracts, and not by tariffs.

The argument which appellant bases upon Sections 2 and 3 (1) of Title 49, U. S. C., at pages 47 to 52 of its brief has already been disposed of in this brief by showing that Terminals is not performing for Wheeling, as compared with its other tenant lines, a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions (Sec. 2);

and that if Wheeling, or its traffic, is accorded any preference or advantage, it is not undue or unreasonable (Sec. 3). See pages 28 to 31, *supra.*

In support of its argument on this head, appellant quotes from three cases decided by this Court: *The Chicago Junction Case,* 264 U. S. 258; *Pennsylvania Company v. United States,* 236 U. S. 351; *United States v. Terminal Railroad Association of St. Louis,* 224 U. S. 382; without, however, analyzing the holdings of these cases. It is submitted that none of them is an authority for the proposition advanced by appellant. *The Chicago Junction Case* merely decided (a) that carriers which suffer serious disadvantage, prejudice and loss of traffic from the transfer of a neutral terminal railroad to the control of a competitor, and which intervened unsuccessfully before the Commission in opposition to such transfer, have a standing to attack the order permitting it, upon the ground that there was no evidence to support the finding of public interest on which the order was based; and (b) that such an order is void if the finding that the acquisition will be in the public interest is made without supporting evidence.

The case of *Pennsylvania Company v. United States, supra,* merely decided that the Interstate Commerce Commission had the power to require the Pennsylvania Railroad Company to switch cars in New Castle, Pennsylvania, on the same terms for all railroads with which it connects at that point, an obligation devolved upon it by paragraph (3) of Section 3, Title 49, U. S. C., as it stood prior to the amendment of February 28, 1920.

That the majority of this Court did not pass upon the question of the use by one carrier of *terminal facilities* of another carrier is clearly shown by the dissenting opinion of Mr. Chief Justice White (l. c. 372), which reads in part as follows:

"The court now holds that this controversy involves merely a switching privilege and the duty of one railroad not to refuse such privilege to another, or at all events if it permits it to one, to allow it to other roads on terms of equality. By a necessary inference, therefore, the decision now made is concerned alone with that subject and does not in any degree whatever as a matter of law involve the right of one railroad company to compel another to permit it to share in its terminal facilities. If I could bring my mind to understand the facts of the controversy as they are now appreciated by the court, there would be no difficulty whatever on my part in accepting the legal principle which is applied to them."

The holding of this Court in *United States vs. Terminal Railroad Association of St. Louis,* 224 U. S. 383, must be weighed in the light of its peculiar facts, and when so regarded argues against the contentions of appellant rather than for them. The question before this Court was whether or not the Association, which owned all of the terminal facilities connected with the bridges and ferries over the Mississippi River at St. Louis, and was owned by only a part of the railroads compelled to use its facilities, constituted a combination in restraint of commerce and a monopoly forbidden by the Sherman Act. The Court described in much detail the unusual topographical conditions existing at St. Louis which compelled all railroads entering that city to utilize the facilities of the Association (conditions which have no parallel in Cleveland), and after stating at pages 401 and 402:

"We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolu-

tion in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote commerce."

continues at page 405:

> *"It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether.* If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities." (Italics ours.)

Again, the court points out at pages 406-407, that the Association is "a terminal company and something more" in that as a railroad company "it files its rate sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river over its lines." The Court therefore concludes at pages 409 and 410-411 of its opinion:

> "But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the States and an attempt

to monopolize commerce among the States which must pass through the gateway at St. Louis."

* * * * *

"If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietary companies as shall constitute the former the *bona fide* agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage."

It clearly appears from this opinion that the decision was based, in a large measure, upon the peculiar physical conditions at St. Louis, resulting in an effective monopoly of terminal facilities in the Association. The Court therefore required the placing of non-proprietary lines upon a basis substantially equal to that of the proprietary lines; but nowhere does it indicate that the Association's charges are to be published in tariffs. On the contrary, its opinion seems to indicate that they are to be the subject of contracts between the Association and the individual lines, as distinguished from the "rate sheets" governing the actual transportation of property by the Association between points on the east side and points on the west side of the river.

4. THE RENTAL SPECIFIED IN THE USER CONTRACT IS NOT SUBJECT TO CHANGE.

In its argument under Points II and VI of its brief appellant urges that the rental specified in the user contract is subject to change. Under Point II it argues that paragraph (4) of Section 3, Title 49, U. S. C. is inapplicable to the user contract. Under Point VI it argues that the rental provided for in the user contract is subject to attack upon complaints filed with the Interstate Commerce Commission and with the Public Utilities Commission of Ohio.

It is submitted that the contentions of appellant under Point II of its brief contradict and defeat its argument under Point I. Briefly stated, appellant's argument under Point II is that paragraph (4) of Section 3 of Title 49, U. S. C., is not applicable because the carrier owning or entitled to the enjoyment of terminal facilities therein referred to is not the same sort of carrier as Terminals. Here appellant seeks to escape from the logic of its previous argument (Point I) to the effect that as Terminals is a carrier, and as the provisions of the Interstate Commerce Act require all carriers to publish and file tariffs and conform thereto, Terminals must file and conform to such tariffs. Here it contends that the term "carrier," as used in Section 3 (4), does not apply to Terminals. Appellant should not be permitted to blow hot and cold upon this proposition. If Terminals is a carrier under the Interstate Commerce Act, then paragraph (4) of Section 3 of the Act as clearly applies to Terminals' rights and obligations with respect to its terminal facilities as it does to the rights and obligations of any railroad company owning and operating terminal facilities as a part of its system of transportation. If paragraph (4) of Section 3 of the Act does not apply to Terminals, certainly Section 6 does not.

Appellant admits at pages 54 and 55 of its brief that if terminal facilities were constructed by one *or more* car-

riers for their own use such facilities would be within the purview of paragraph (4) of Section 3. To contend, however, that paragraph (4) does not apply to terminal facilities of a union depot company, organized and owned entirely by three railroad corporations, constructed and operated under a certificate of public convenience and necessity obtained by these three railroad companies from the Interstate Commerce Commission, is to draw a distinction without a difference. Appellant's argument, if accepted, requires the conclusion that the Commission has power to open to one railroad the terminal facilities owned by one or more other railroads, but has not the power to require a union depot company, owned by these same railroads, to open its facilities to a non-proprietary railroad company. This argument is directly opposed to the only authority bearing upon this question, the report of the Commission in *Chicago & Alton Railroad Company, et al., v. Toledo, Peoria & Western Railway Company,* 146 I. C. C. 171. There the defendant sought to cancel an agreement permitting the Chicago & Alton to operate over a portion of defendant's lines and to renew it at increased rental. The trackage right in question enabled the complainant *inter alia* to operate its passenger trains into the union passenger station of the Peoria & Pekin Union Railway Company at Peoria. As to the applicability of paragraph (4) of Section 3 to a union depot the Commission says at pages 178 and 179 of its report:

> "In *Missouri-Kansas-Texas R. R. Co. v. K. C. T. Ry. Co.,* 104 I. C. C. 203, respondent, a unified terminal facility, contended, among other things, that it was outside the pale of the statute because of the fact that it was solely a terminal facility having no 'main-line track or tracks for a reasonable distance outside' the terminal area. In other words it contended that the main-line track and the terminal facility must be co-

existent in the same ownership before the paragraph becomes operative. We there said, at page 228:

> 'Certainly, respondent is a carrier owning or entitled to the enjoyment of the terminals in question, and it and each of the proprietary lines is a common carrier subject to the act. While the provisions of section 3 (4) relating to "main-line track or tracks for a reasonable distance outside" a terminal might possibly suggest that in framing it Congress had in mind, as the more common situation, trunk lines as terminal owners, yet Congress could hardly have been unaware of the practice of creating and operating joint terminals through subsidiary terminal companies. At least, the provision is not limited to trunk-line terminals; nor is the authorized relief limited in any case to a terminal use in connection with an outside main-line use, which latter a petitioner might not desire or be in position to make.'

> "Having the power to require the user in terminal service of a unified terminal facility which owns no main-line track outside the terminal, we are of opinion that we likewise have the power to require user of the main-line track of a carrier for a reasonable distance in order to reach such a facility. Moreover, it must be borne in mind that the act covers not only such terminals as are 'owned' by a carrier but also those in respect of which it is 'entitled to the enjoyment' in order to 'handle its own business.' Any other construction of the statute would render nugatory our power to accord relief in the public interest in respect of many terminal areas where the terminal facilities are owned or operated by subsidiary or independent companies owning no main-line track 'outside' of the terminal area. We see a plain distinction between instances of this character and those in which we are asked by one trunk line to require use of the tracks of another trunk line to reach the terminals of a third trunk line."

Appellant further contends that even if paragraph (4) of Section 3 applies to the terminal facilities of a union

depot company, yet the provisions of the paragraph that the outside carriers may obtain use of the terminal facilities "on such terms and for such compensation as the carriers affected may agree upon" means not what it says, but that such terms and compensation must be just and reasonable, not preferential and not discriminatory; in other words, must meet the tests applicable to a rate. This contention ignores the fundamental rule that where the language is plain and unambiguous there is no room for judicial construction. It is only "in the event of a failure to agree" that the terms and compensation may be fixed by the Commission under the principle controlling compensation in condemnation proceedings. In the face of language so clear there is no justification for injecting into the voluntary agreement between the carriers the rule of compensation which applies when property is taken for a public use against the will of the owner.

Paragraph (4) of Section 3 of Title 49, U. S. C. was written into the title by the Transportation Act 1920, which also contains the provisions set forth in paragraphs (18) to (22) of Section 1 of Title 49. Thus, even where the Interstate Commerce Commission is given specific authority to compel the joint use of terminal facilities, its power to fix the terms for such joint use is limited, in the first instance, by the agreement of the carriers if such agreement can be effected. The Commission's power to fix terms comes into being only in the event of failure to agree. *A fortiori* it would appear that the Commission's power to fix terms for the joint use of terminal facilities under paragraphs (18) to (22) of Section 1 of the same title should be restricted to those cases where the owner of the facility and the proposed tenant line have failed to reach an agreement. This view finds support in the case of *Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company*, 104 I. C. C. 203. In that

case the Missouri-Kansas-Texas Railroad Company, referred to as the petitioner, and certain intervening railroads contended that the Commission had jurisdiction under paragraphs (1), (3) and (4) of Section 3, and under Section 15-a, of Title 49, U. S. C., to relieve them of their obligations to share ratably in certain capital charges of the Kansas City Terminal as provided in their operating contracts with the Kansas City Terminal Railway Company. The Commission held that no power is conferred upon it by Section 3 of the Act to revise or reform such a contract. See the lengthy discussion of this point at pages 221 to 224 of the report.

Of particular significance, as bearing upon the charge that the contract in this proceeding is discriminatory, is the following paragraph of the Commission's opinion appearing at page 227:

> "It also is contended that to admit petitioner to the terminals upon terms other than those provided by the operating agreement and applicable to the proprietary lines would constitute an undue preference of petitioner and undue prejudice to the proprietaries or an unlawful discrimination against the latter. This apparently assumes, what ultimately might be found to be or not to be the fact (and what respondent believes would not be the fact), that the terms to be accorded would be more favorable than the contract terms. Be that as it may, what would be true of a single owner of the terminals would be true of virtually joint owners, including a subsidiary terminal company, and as between the mutual terms upon which the proprietary joint use is had and other terms accorded an outside line, as distinguished from discriminating terms accorded two or more outside lines, there would be no ground for a predication of undue prejudice and preference or unjust discrimination within the meaning of the act. See *Louisville & Nash. R. R. v. United States*, 242 U. S. 60."

It is submitted, therefore, that the stautory court correctly interpreted the effect of paragraph (4) of Section 3, 49 U. S. C., when it said (R. 493):

> "We are of the opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration the financial condition of the contracting parties, the ability to pay, the use required and all other surrounding circumstances."

Whether or not paragraph (4) of Section 3 of Title 49, U. S. C. is applicable to the user contract, the fact remains that the Commission has received and considered substantial evidence offered by Wheeling and Terminals as to the propriety of the rental specified in the user contract, and has approved the contract by the issuance of the certificates of public convenience and necessity. In so approving the contract it has exercised an administrative function which is not subject to review, except where the Commission has exceeded its powers, acted arbitrarily, or permitted some irregularity in the proceedings, which, it is submitted, is not true of this case. See authorities cited under Point 1 of the argument, *supra.*

Under Point VI of its brief appellant contends that "the rental specified in the user contract is subject to change." It has already made the same contention under Point II, but here it relies upon the provisions of the Interstate Commerce Act and of the Ohio General Code giving respectively to the Interstate Commerce Commission and to the Public Utilities Commission of Ohio power to entertain and decide complaints as to the reasonableness of rates. If we are correct in our contention that Terminals is not required to file and conform to a tariff of charges,

then Sections 12 and 13 of the Interstate Commerce Act and Sections 524, 525, 527 and 528 of the Ohio General Code give the Interstate Commerce Commission and the Public Utilities Commission respectively no jurisdiction to entertain complaints against the rental to be charged Wheeling for the use of Terminals' facilities. In fact, the Ohio Supreme Court, in a case involving appellant and The Wheeling and Lake Erie Railway Company, has already indicated that the Public Utilities Commission of Ohio has no jurisdiction of the rental provided for in this contract. At pages 437-438 of its opinion in the case of *The Pittsburgh & West Virginia Railway Company vs. The Public Utilities Commission of Ohio,* 120 O. S. 434, the court says:

> "The basis of the complaint of the stockholder, as shown in its application for rehearing, is that the Wheeling & Lake Erie has entered into an improvident contract for the facilities and service of the Union Depot.
>
> "Obviously the Public Utilities Commission of Ohio is not authorized to pass upon that question, or upon the other issues sought to be presented to the commission by the application for a rehearing. These administrative matters, relating to abandonment of facilities or the extension thereof, are within the exclusive jurisdiction of the Interstate Commerce Commission. *Colorado v. United States,* 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.,* 271 U. S., 244, 46 S. Ct. 535, 70 L. Ed. 928.
>
> "The record discloses that an application of the same purport and effect as that filed with the state commission was previously filed with the Interstate Commerce Commission and is now pending."

Appellant fails to point to anyone who could complain of the rental charged Wheeling by Terminals. So far as the record shows the only other railroads which have ar-

ranged to use the union depot are the three proprietary lines, which have already approved the user contract, and are therefore bound by its terms or at least estopped to attack it. See Ex. 69, Art. III.

In effect, appellant is asking the Court to exercise its extraordinary power of injunction to strike down this contract upon the mere apprehension that later some person or corporation, now unknown, may successfully attack it. The extraordinary powers of a court of equity should not be exercised for such a purpose.

American Coal Mining Company vs. Special Coal and Food Commission, 268 Fed. 563; appeal dismissed, 258 U. S. 632;

Farmers' State Bank vs. Board of Commissioners, 295 Fed. 755;

Delaware, L. & W. R. Co., vs. Switchmen's Union of North America, et al., 158 Fed. 541.

5. THE USER CONTRACT IS NOT UNDULY OR UNREASONABLY PREFERENTIAL OR UNJUSTLY DISCRIMINATORY; NOR DOES IT PROVIDE FOR A REBATE.

Point III of appellant's brief is devoted to an argument that the user contract (Ex. 15) between Terminals and Wheeling (a) is not in accordance with any filed tariff or schedule; (b) is preferential and discriminatory; and (c) provides for a rebate.

It may be admitted that the contract is not in accordance with any filed tariff or schedule, but this has no legal significance. As shown by the argument in the preceding pages of this brief, Terminals is not required to publish tariffs or schedules; hence, the lack of conformity of the contract with some schedule or tariff is of no consequence.

The charge that the contract is preferential and discriminatory requires more serious attention. By this charge appellant apparently refers to an unjust discrimina-

tion prohibited by Section 2 of Title 49, U. S. C., and an undue or unreasonable preference prohibited by paragraph (1) of Section 3 of the same Title.

Assuming, without admitting, that Terminals is a common carrier and that it is therefore subject to the provisions of Sections 2 and 3 of the Interstate Commerce Act, it is submitted that the user contract creates no unjust discrimination or undue or unreasonable preference. It goes almost without saying that carriers constantly create discriminations and preferences in the establishment of rates, rules and practices which are entirely lawful because the discriminations are not unjust or the preferences undue and unreasonable.

That the Interstate Commerce Act does not impose strict uniformity on the carriers, and that all discriminations are not unjust or all preferences undue or unreasonable, has often been recognized in the decisions of this Court. Thus, it is said in the case of *Manufacturers Railway Company, et al., v. United States, et al.*, 246 U. S. 457, at pages 481-482:

> "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887, c. 104, 24 Stat. 379, 380) renders unlawful any *'undue or unreasonable'* preference or advantage, prejudice or disadvantage."
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> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, ex-

ceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of §§ 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589-591, c. 3591; 36 Stat. 551-554, c. 309), expounded in familiar decisions. *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 469-470; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Procter & Gamble Co. v. United States*, 225 U. S. 282, 297-298; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91."

See also *United States et al., v. Illinois Central Railroad Company, et al.*, 263 U. S. 515, 521; *Central Railroad Company of New Jersey, et al., v. United States, et al.*, 257 U. S. 247, 259.

In its development of this argument appellant first contends that Wheeling's proportion of the capital expenditures would be about five per cent of the total, based upon its proportionate use of the station. Appellant predicates this argument upon the testimony of Mr. Duncan, which however related not to the present situation but to the situation as it existed about 1920 (R. 276-277). Appellant's argument at this point fails, as it clearly appears (R. 222, 308; Ex. 120) that Wheeling will operate into and out of the station an aggregate of about 22 cars per day as compared with an aggregate of about 1008 cars per day for the proprietary lines. It has already been shown in this brief that the service which Terminals is to render to Wheeling is entirely different in quantity and quality from the service which Terminals will render to the proprietary lines, and that Wheeling's passenger traffic is likewise of an entirely different character from that of the three proprietary lines (pp. 28-31, *supra*). These differences in service and in the character of the traffic show how impossible it would be to apply to Wheeling, on the one hand, and to the propri-

etary lines, on the other hand, a strictly uniform rule for compensation for use of Terminals' facilities.

Again, appellant contends at page 59 of its brief that the contract is discriminatory, because if appellant or any other connecting carrier sends a car into the Terminal via Wheeling such connecting carrier must pay Terminals for the service a rate equivalent to that paid by the proprietary lines. The provisions of the contract there quoted as to charges for off-line cars mean no such thing. The user contract makes no bargain between Terminals and any of Wheeling's connecting lines, and is not for the benefit of any of such lines. The bargain is solely between Wheeling and Terminals, and no connecting carrier can be made subject to its benefits or obligations. Here appellant inveighs against the application of the very rule which it contends should apply to all of Wheeling cars, namely, that they be charged for on the same basis as those of the proprietary lines.

Appellant's detailed showing of alleged discrimination is based almost entirely upon the cost estimates of Mr. Charles O. Dambach, Superintendent of appellant (R. 312). Mr. Dambach's experience during the past twenty years has been with railroads varying in length from five miles to ninety miles, which have no through passenger service or Pullman or sleeper service (R. 313-316). Before making the cost estimates submitted in this proceeding as Exhibits 102 and 155 he had never made a cost study covering any union passenger depot or any large passenger station (R. 314-316). He has never had any experience with electrical operation (R. 316). In preparing his original estimate (Exhibit 102) he made no independent investigation to determine the actual number of trains which would be handled through the new union depot (R. 314). In his estimate he apportioned his charges for taxes and interest on investment among the applicant and three proprietary

lines on a per car basis (R. 316-317), although he admitted that the applicant would make no use of any part of the west approach (which is about 9000 feet in length and crosses over the Cuyahoga River at a height of 93 feet above the water on a series of piers) or of the westerly half of the station, or of the coach yard tracks (with a total trackage of from 15,000 to 20,000 feet), or of the ten traction tracks in the station, and would operate over only about 1000 feet of the east approach, which is about 8500 feet in length. He made no effort to determine what proportion of the total investment cost was represented by these facilities which applicant would not use at all (R. 317-318).

In the matter of the adjustment of operating expenses he charged the applicant with an amount per car or per train out of all proportion to the relative service which it would receive from Terminals, that is, he charged Wheeling its full per car proportion of the station service items and fifty per cent of its per car proportion of operating expenses, although Wheeling would receive far less than that proportion of terminal service on account of its extremely short haul in the terminal area (R. 313-317, 319). In determining the number of cars per train in his original estimate (Ex. 102) he took not the actual number of cars per train operated by the applicant but the maximum number specified in the user contract, which is greater (R. 222); and, for the proprietary lines, not the number of cars per train actually operated on their main lines through Cleveland, but the average number for their systems, which is less (R. 319, 322). These last mentioned errors were cured in the revised estimate (Ex. 155), but illustrate the superficial character of the study made by Mr. Dambach. The basic figures used in these exhibits are merely average costs selected here and there from annual reports of several union depot and terminal companies, all operated by steam

except the Staten Island Railroad; which, however, has no large passenger terminal (R. 319-322). It is submitted that Mr. Dambach's obvious lack of experience, the superficial and inadequate investigation which he made for the purpose of his study, and the unscientific manner in which he compiled his estimates, completely disqualify both of these exhibits and leave the appellant without any proof upon this subject.

It is conceivable that the contract might be open to attack as discriminatory or preferential if it were shown to be a burden upon interstate commerce. However, the Commission had substantial evidence before it to the contrary in the testimony of Mr. H. D. Jouett, Chief Engineer of Terminals, who had supervised the construction of its union depot since its inception in 1922. Mr. Jouett submitted an estimate showing that the out-of-pocket cost to Terminals for Wheeling's use of the facilities would be about $19,110 per year, estimated as follows:

Additional station force of one ticket seller and one baggage porter	$ 3,000
Heating Wheeling's cars	250
Power, maintenance and fixed charges of locomotives employed in hauling Wheeling's trains, and share of locomotive crews in hauling Wheeling's trains	8,050
Interest, taxes and maintenance of additional construction required to bring Wheeling's trains into the station	7,810
Total	$19,110

A cursory study of this estimate shows that it is extremely liberal as an out-of-pocket cost estimate. A true out-of-pocket cost estimate includes only those items which would be saved to the Terminals Company by the elimination of Wheeling. That this estimate includes those items

and more is obvious. For example, the largest single item of $8,050 includes not only the power for the hauling of Wheeling's trains and the maintenance of the locomotives required in that service, but the wages of the crews operating the electric locomotives which presumably would be required to man the locomotives whether Wheeling's trains were operated into the station or not. To the extent therefore that this item includes wages of crews it is in excess of the true out-of-pocket cost to Terminals, which apparently would not be saved the crew expense even if Wheeling was eliminated from the union station. This is likewise true of the fixed charges of these locomotives, which are included in the item of $8,050.

This estimate is criticized at pages 63-66 of appellant's brief. It is submitted that these criticisms are without merit. Thus, it is suggested by appellant that a single baggage porter could not handle all of Wheeling's express, baggage, mail and milk. The short answer is that he would not be required to do so. The express would obviously be handled by the employes of the express company, the mail by the employes of the Post Office department, the milk and empty milk cans by Wheeling's train crew, leaving only the handling of the passengers' individual baggage. While the record does not show what proportion of the 260 passengers handled by Wheeling per day in and out of Cleveland have hand baggage, it does show that Wheeling's passenger service is local, as distinguished from through service (R. 221-222; Ex. 1), and that at the time the negotiations for the use of the union depot began the average haul of its passengers was probably less than 50 miles. Such traffic is substantially like commuting traffic, which involves little baggage. In any event there is no showing in the record that an additional baggage porter could not handle the additional work created by Wheeling's passengers, and Mr. Jouett's estimate that one porter would be sufficient is

therefore uncontradicted. The same may be said of the criticisms as to the items of heating cars, locomotive expenses, and interest, taxes and maintenance of additional construction required to bring Wheeling's trains into the station. While it is true that Mr. Jouett's estimate is based on 2503 trains per annum (the annual number now operated by Wheeling, exclusive of excursion trains), it is shown that if Wheeling should operate additional trains this would increase the cost of the train handling only, with an almost negligible increase in the cost of heating; and that if the number of Wheeling's cars to be operated into the union depot should increase without any increase in the number of trains, this would cause no additional expense for crews and but a slight increase in the power consumption, which would not be in direct proportion to the increase in the number of cars (R. 393). The testimony of Mr. Jouett shows that the reason for the omission from his estimate of the cost of receiving and dispatching United States mail, railroad mail, newspapers and company materials and supplies, the furnishing of space for the receipt, delivery and storage of express shipments, the furnishing of information by clerks, bulletin boards, notices or otherwise, the expense of dispatching, operating a signal tower and interlocking devices is due to the fact that Terminals will have exactly the same expense in respect to those items whether it handles the trains of Wheeling or not. Attention is invited to the fact that in addition to the additional baggage porter included in his estimate, Mr. Jouett has provided for one ticket seller whose only duty apparently would be to sell tickets for three outbound Wheeling passenger trains per day to a total number of outbound passengers, excluding excursionists, of about 47,000 per annum, or 130 per day, which is obviously a liberal estimate for the selling of so small a number of tickets.

Mr. Dambach sought to anticipate testimony as to out-of-pocket cost for handling Wheeling's trains, to which he referred at page 315 of the record. Due to his lack of familiarity with the methods of operation he erroneously included in the cost to Terminals the cost of train crews; though it was shown (R. 389) that Wheeling's train crew would remain on the train until it was unloaded, thus relieving Terminals of that expense. He also assumed that a locomotive would be obliged to make four trips to handle each of Wheeling's trains, consuming an average time of one hour, while as a practical matter it was shown that the method of operation would be entirely different, and that the average locomotive time per train would be only about thirty minutes (R. 389-392).

Nowhere in the record is it shown that the out-of-pocket cost of Terminals' operation of Wheeling's trains would exceed $20,000 a year. The only evidence dealing directly with this subject is to the contrary and shows that the compensation to be paid exceeds the out-of-pocket cost to Terminals. This definitely negatives the idea that Wheeling's use of Terminals' facilities will constitute a burden on interstate commerce.

But the principles announced by this Court in familiar cases construing and applying provisions of the Transportation Act would seem to permit the Commission to authorize the user contract even if its terms were unduly preferential to Wheeling as compared with other tenants of Terminals. Thus, in the case of *Dayton-Goose Creek Railway Company v. United States*, 263 U. S. 456, the Supreme Court upheld the provisions of the recapture clause of the Transportation Act 1920 (Section 15-a, Title 49 U. S. C.) in the face of the fact that this legislation inevitably requires that strong railroads may be obliged to charge higher rates than would be reasonable for them to charge, if considered alone, in order that weak railroads

may be able to maintain their rates upon the same level. The justification for supporting the legislation is the necessity of preserving an adequate national transportation machine. Again, in the *New England Divisions* case, 261 U. S. 184, the Court upheld the order of the Commission increasing the agreed divisions of New England roads on certain through traffic moving to New England points and points west of the Hudson River, the Commission having found that the New England roads were in need of increased revenue. The Court refers (pages 189-190) to the new rights, obligations and machinery created by the Transportation Act to ensure adequate transportation service, among them (page 190, Note 7) the joint use of terminals. Compare *Railroad Commission of California v. Southern Pacific Company,* 264 U. S. 331, 343. Finally, it is submitted that the Commission in approving the user contract has conclusively rejected the claim that it is unjustly discriminatory or unduly or unreasonably preferential.

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission. (*Interstate Commerce Commission v. Alabama Midland Ry. Co.,* 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."
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> *Manufacturers Ry. Co. v. United States,* 246 U. S. 457, 481.

Appellant's argument that the user contract provides for a rebate seems almost too fanciful to deserve a reply. It ignores the fact that Terminals is a union depot company and not a railroad company. It implies that Ter-

minals is obliged to publish schedules of rates, fares and charges to which it must conform. But, as has been heretofore shown, Terminals is under no such obligation.

Appellant bases this argument upon Section 2, Title 49, U. S. C., and Section 614-14 of the General Code of Ohio, both quoted at page 68 of its brief. It has been heretofore pointed out that, as compared with the proprietary lines, Wheeling is not receiving "a like and contemporaneous service" under "substantially similar circumstances and conditions," and Section 2 of the Interstate Commerce Act is patently inapplicable to the instant case. The provisions for the payment to Wheeling of an amount not in excess of $200,000 in the event Wheeling is dissatisfied with the facilities and service furnished it by Terminals is clearly nothing more than an agreement for liquidated damages in the event the contract is not performed by Terminals to Wheeling's satisfaction. The money is to be paid only to reimburse Wheeling for the cost of constructing an individual station. It furnishes additional protection to Wheeling and its patrons in the event Terminals should fail to provide the facilities and service which it is obligated to provide under the user contract. It does not reduce the amount which Wheeling must pay under the user contract. It neither serves to decrease the fares of Wheeling's passengers nor to increase those of other tenant lines.

Appellant's argument that the contingent liability to pay Wheeling $200,000 violates Section 614-14 of the General Code of Ohio, if accepted, defeats its fundamental proposition that Terminals is a railroad. This section is a part of the Act of May 31, 1911 (102 Ohio Laws 549, §16), and Section 614-2a, which is a part of that act, as amended, provides that:

> "The term 'public utility' as used in this act, shall mean and include every corporation, company, copartnership, person or association, their lessees, trustees or

receivers, defined in the next preceding section, except private contract carriers and except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, *and except such utilities as are defined as 'railroads' in sections 501 and 502 of the General Code,* and these terms shall apply in defining 'public utilities' and 'railroads' wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act." (Emphasis ours.)

6. THE REPORT AND FINDINGS OF THE COMMISSION ARE NOT OPEN TO THE ATTACK THAT THEY ARE WITHOUT WARRANT IN LAW, CONTRARY TO LAW OR ARBITRARY.

In Point IV of its brief appellant contends that the report and findings of the Commission with respect to the status of Terminals, the jurisdiction of the Commission to change the user contract, and the validity of the user contract itself are (a) without warrant in law and contrary to law; and (b) arbitrary, in that they ignore the testimony offered. This argument may be disposed of briefly. At page 69 of its brief appellant states that "every member of the Commission expressed the view that the contract here in question was preferential," and supports the statement by quoting a part of the following sentence from the majority opinion of the Commission (R. 51):

> "It is clearly apparent that the contract is favorable to the applicant, yet the protestant, as a minority stockholder of the applicant, appears in the unusual position of objecting to that contract that it is favorable."

and by referring to expressions in the concurring opinions of Chairman Lewis and Commissioner McManamy, and in the dissenting opinion of Commissioner Eastman. The

term "favorable" is of course not synonymous with "unduly or unreasonably preferential." The contract may be favorable without being unjustly discriminatory or unduly or unreasonably preferential. This is all that the majority of the Commission found; and apparently this is all that Chairman Lewis and Commissioner McManamy meant, as they concurred with the majority in the result. Mr. Eastman was the only Commissioner who dissented upon this ground.

We submit that it has been sufficiently shown heretofore that Wheeling's user contract is not unjustly discrimatory, or unduly or unreasonably preferential. Obviously, the Commission has no jurisdiction to strike down a contract merely because it is otherwise favorable.

Nor could it do so upon the theory that the user contract and the option contract (Exhibit 11) for the sale of Wheeling's lands to The Cleveland Terminals Building Company were interdependent. The uncontradicted testimony of Mr. Duncan (R. 291) is that the consideration for the sale of the land and the compensation for Wheeling's use of the union depot were arrived at independently of each other. A contrary finding by the Commission would have been arbitrary, as opposed to the uncontradicted evidence. The argument which appellant seeks to draw from the expressions of Chairman Lewis and Commissioner McManamy is entirely inconsistent with the argument which it makes at Point V of its brief "that the District Court erred in finding and holding that the user contract and the option to sell are wholly interdependent and must be considered as one."

Appellant charges that the Commission ignored the testimony offered as to the propriety of the rental of $20,000 to be charged Wheeling. On the contrary, the discussion of this point at page 50 of the record shows that it was fully considered by the Commission, and the Commission's

approval of the contract, whether upon the theory of lack of jurisdiction to change the compensation voluntarily agreed to by the parties or upon the theory of its inherent reasonableness, is not open to attack at this stage.

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co. v. United States,* 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested."
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> *Virginian Railway Company v. United States, et al.,* 272 U. S. 658, 663.

See also

Chicago, Rock Island & Pacific Railway Company, et al. v. United States, et al., 274 U. S. 29, 33.

The Assigned Car Cases, 274 U. S. 564, 580.

7. THE ALLEGED VIOLATION OF THE CLAYTON ACT BY CERTAIN OF WHEELING'S STOCKHOLDERS IS IRRELEVANT TO THIS CASE.

The appellant contends that the undoubted purchases by the New York Central, Nickel Plate and B. & O., early in 1927, of blocks of Wheeling stocks totalling more than half of all its outstanding stock and including nearly all of its Prior Lien Stock were in violation of Section 18 of Title 15, U. S. C., (Clayton Act, Section 7). There is no evidence in this record that such purchases were a violation. It was not proven, and the Commission could not have found upon this record, that the Act had been vio-

lated. We contend in our answer that, while there is competition in varying degrees between Wheeling and the three railroads which acquired control of its stock, the lines of Wheeling are largely supplementary and complementary to the lines of each of said roads.

At the time of the acts complained of, each of the three carriers owned slightly more than one-sixth of Wheeling's outstanding stock. Obviously no one of them could have controlled Wheeling in such a way as "to substantially lessen competition" between Wheeling and itself, without the assistance, or at least in the face of the opposition, of the other two. There was no evidence in this case authorizing, —certainly none requiring—the Commission to find that there was such actual or probable combination between the three roads to cripple Wheeling's competitive power as would warrant this Court in vacating the Commission's certificates. Before the Commission, the appellant relied upon an order of divestiture against the three stockholding carriers, 152 I. C. C. 721 (Ex. 97).

But such an order is not evidential as against Wheeling in any event because Wheeling was not a party to the proceedings. Moreover, such an order is not a *res adjudicata,* even as against B. & O., Central and Nickel Plate.

The Commission is not a court and there is nothing in the Act that indicates that Congress intended to vest it with judicial powers. On the contrary, it is provided by Section 21 that before the Commission's order to divest can be made effective the matter must be taken before the proper Circuit Court of Appeals. After hearing, the court is authorized to make a decree affirming, modifying or setting aside the order of the Commission. The Act then provides:

> "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 347 of Title 28, Judicial Code and Judiciary."

It is apparent, therefore, that until the Commission's order has been reviewed upon "the pleadings, testimony and proceedings" by a Circuit Court of Appeals having jurisdiction and a judgment entered thereon, there is no *res adjudicata.*

Congress has taken pains to make it clear that the Commission's order is not an adjudication, for the section provides:

> "Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, and upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section."

This unlimited right of the Commission to modify or set aside its order deprives the order of divestiture of any affinity whatever with those final judgments which stand "as a plea, a bar and as evidence conclusive" of all matters therein adjudicated as between the parties.

A reading of the section as a whole suggests that orders of divestiture such as are referred to in the bill, are analogous not to the judgments of a court, but rather to reports of masters to whom matters have been referred, with instructions to find the facts. Such a report unconfirmed by the appointing court would be without evidential value in another court in a proceeding between other parties.

This Court cannot, we respectfully submit, give any effect whatever in this proceeding to the Commission's orders of divestiture for the further reason that the section in question provides:

> "The jurisdiction of the Circuit Court of Appeals of the United States to *enforce,* set aside, or modify orders of the commission or board shall be exclusive." (Italics ours.)

But even if we were to assume for appellant's benefit that B. & O., Central and Nickel Plate held a majority of all of the Wheeling stock in violation of the Clayton Act at the time of the elections of directors at Wheeling's annual meetings in 1927 and 1928, no ground yet appears for holding void the Commission's two certificates which are before this Court. In earlier stages of this litigation and in another similar controversy with The Pittsburgh & West Virginia Railway Company (*The Wheeling and Lake Erie Railway Company v. The Pittsburgh & West Virginia Railway Company,* 33 Fed. 2d 390), we have had to argue that the alleged fact that certain of our stockholders had been violating the law, did not make Wheeling a corporate imbecile incapable of any valid corporate action; that it was only where the alleged illegal stock control of Wheeling resulted in a corporate act by it, contributing directly to a substantial lessening of competition between Wheeling and the stockholders involved, that Wheeling's corporate acts were void.

It has been consistently held by this Court even as to actual violators of the Anti-Trust Act, that only such of their acts as were in furtherance of the unlawful purpose, were illegal.

> *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540;
> *Wilder Mfg. Co. v. Corn Products Refining Co.,* 236 U. S. 165.

Common justice to Wheeling and such of its stockholders as have not been breaking the Clayton Act would seem to require at least as favorable a judicial attitude towards its acts which did not in themselves contribute to any illegal result.

Now, at last, in this Court, appellant apparently concedes our contention in this respect. If we correctly understand its contention, as set forth on pages 87 to 95 inclusive, of its brief, it makes no claim for relief here because of

the alleged illegal acts of New York Central and B. & O. in acquiring Wheeling stock apart from a contention advanced therein that that ownership directly brought about the user and option contracts and that by means of these two contracts the lessening of competition between Wheeling and the stockholding carriers, which was potential in the mere purchase, will be made actual.

The argument runs thus,—the controlling stockholders elect directors, and the directors authorize the user contract, the abandonment of the old station site and the option contract. This user contract is "a discriminatory rebating contract" (appellant's brief, page 90). Moreover, "it is diabolical in its terms and is beyond question designed for the purpose of depriving Wheeling, a competitor of Central, B. & O. and Nickel Plate, of a very valuable passenger station site and of imposing upon Wheeling a burden which Wheeling cannot afford to carry, but which it cannot escape if it is permitted to do that which it seeks to do, and which can mean nothing but receivership in the long run." (Appellant's brief, page 90.)

But if all or any of these hard words are justified, the user contract must fall, we submit, without respect to whether Wheeling stockholders are law breakers. If the user contract can only be brought within the range of the Clayton Act by showing that it is in and of itself diabolical and certain to land Wheeling in a receivership, then, we contend that the alleged violation of the Clayton Act by our former stockholders, is either entirely superfluous or is wholly beside the point, depending upon whether counsel's charges with reference to the user contract are well founded or not.

Elsewhere in this brief we advance our contention that the user contract is not a rebate, that it is not discriminatory in any sense that connotes illegality, and that it is neither burdensome nor productive of a receivership, but is on the

contrary the means of affording Wheeling's passengers far better facilities than we could otherwise provide them at a cost within our means.

If the Court should find our contention in those respects well founded, then it is apparent, and as we understand it appellant concedes, that the question whether New York Central, B. & O. and Nickel Plate violated the Clayton Act in acquiring their holdings of Wheeling stock, is without any relevance. Before leaving the subject, however, we wish to invite the Court's attention to a few facts.

We concede that B. & O. is in competition with Wheeling for passenger traffic in and out of Cleveland. It has no interest in Terminals whatever. New York Central and Nickel Plate are Proprietary Lines of Terminals but the record is devoid of any evidence that either of them is competitive to Wheeling with respect to Cleveland passenger business. A glance at any railroad map will show that they are not. See, for example, Exhibit 1.

If B. & O., having accomplished the ruin of Wheeling, were to get all of its passenger business in and out of Cleveland, the outbound gross receipts of which amount to only $82,000.00 per year, it would be poorly recompensed for the loss of the millions which it invested in Wheeling securities. There is no evidence as to the amount of the profit which the three carriers would realize if they got all the other competitive traffic which Wheeling now carries. We submit that the record would have to show that Wheeling's share of such competitive traffic was large indeed before the Commission would be warranted in finding that in order to get it the three carriers were willing to ruin the company in which they themselves owned more than half the stock. It is a new kind of conspiracy to ruin a competitor in which the first step of the conspirators is to invest heavily in the stock of their proposed victim.

8. THE ALLEGED VIOLATION BY WHEELING'S STOCKHOLDERS OF SECTION 8683 OF THE GENERAL CODE OF OHIO IS IRRELEVANT TO THIS CASE.

On page 96 of its brief, appellant argues that the user and option contracts are void because they were authorized by directors elected by stock acquired contrary to Section 8683 of the General Code of Ohio. The section reads as follows:

> "A private corporation also may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition."

This statute was in force when Central, B. & O. and Nickel Plate acquired a controlling interest in Wheeling stock early in 1927. It was still in force at the time of the election of Wheeling directors on the 25th day of May, 1927, although its repeal had been enacted by a statute approved by the Governor of Ohio, March 8, 1927, which repeal became effective June 8, 1927, more than a year before any of the corporate action herein complained of, and a year and a half before the filing of Wheeling's applications with the Interstate Commerce Commission.

It will be noted that the statute does not in terms prohibit the acquiring by one Ohio corporation of stock in a competing corporation. It purports only to authorize a corporation to acquire stock in a kindred but non-competing corporation. The act is not prohibitive at all. It purports to be a grant of power—a grant since repealed because the Legislature considered it superfluous.

If we indulge, however, in the assumption that the stock was acquired and held at the time of the election of directors on May 25, 1927, in violation of Section 8683, it does not follow that the user and option contracts were invalid.

If we are correct in our contention heretofore advanced (p. 4, *supra*), that the jurisdiction of this Court is limited to review so much of the decree below as upheld the certificates of public convenience and necessity awarded by the Commission, there would appear to be very little substance to appellant's contention. We do not suppose that it can be claimed that a purely administrative body, such as this Court has declared the Commission to be, (*Interstate Commerce Commission v. Humboldt Steamship Corporation*, 224 U. S. 474, 484) has authority to try the title to office of directors whose *de facto* status is admitted.

Even if the Court should decide that it had jurisdiction to review on this appeal so much of the decree below as relates to Wheeling's proposed corporate action, as distinguished from the certificates of the Commission permitting such action, still we contend that appellant is making a collateral attack on the title of *de facto* directors which, on established principles of law, cannot be permitted.

There are two reasons why such a collateral attack is bad. In the first place, the state has provided a complete remedy at law by way of suit, in the nature of *quo warranto* under General Code of Ohio Section 12303, *et seq.* In the second place, the trial of the question of title of the directors in an equity suit to enjoin a specific act authorized by them could only result in an injunction against the specific corporate acts proposed, for the appellant has not prayed for, and could not get in this case, an order of ouster.

The entire management of the corporation would thus be under the cloud of a judicial condemnation and yet its *de facto* directors would retain possession of their offices. The business of the company would be reduced to chaos by judicial decree. The law was settled in this respect in Ohio, by the decision of the Supreme Court of the state in *First Presbyterian Society v. Smithers*, 12 O. S. 248, decided in 1861. The Court said at page 251:

"But, in the *trial* of this issue, the proof would have to be confined to the question as to who were, and who were not, *de facto*, trustees of the corporation; for it seems to be settled that the title, as corporators, of persons claiming to be, not *de facto*, but *de jure*, members or officers of a corporation, can not be thus tried and determined in a collateral proceeding; and that this can be done only in a direct proceeding by information in the nature of a *quo warranto*. *Hullman v. v. Holcomp*, 5 Ohio St. Rep. 237; *First Parish in Sudbury v. Stearns*, 21 Pick. 148; *Trustees of Vernon v. Hills*, 6 Cowen, 23."

The rule is stated in one of the leading texts as follows:

"The general rule is that the acts of *de facto* officers bind the stockholders, both in favor of third persons and of the corporation; that the corporation may rely on the acts of its *de facto* officers as against the opposition of stockholders." 3 *Fletcher on Corporations*, page 3042.

See also the following cases:

Consolidated Mining Company v. Callahan Mining Company, 228 Fed. 528;
Langan v. Francklyn, 20 N. Y. Supp. 404;
Lewis v. Matthews, 146 N. Y. Supp. 424;
Sherwood v. Wallin, 154 Cal. 735;
Guarantee Loan Company v. Fontanel, 183 Cal. 1;
Young v. Schenck (Wash.) 116 Pac. 588.

9. SECTIONS 8747, 8806-8809 AND 8772 OF THE GENERAL CODE OF OHIO DO NOT APPLY TO WHAT WHEELING PROPOSES TO DO.

Before discussing whether the Ohio statutes referred to are applicable in the present case, or if they are applicable, the effect upon this proceeding of failure to comply with them, we wish to point out just what physical change the abandonment of Wheeling's line north of Eagle Avenue

will occasion and what operating changes will be brought about by the user contract.

If Wheeling is permitted to abandon its Ontario Street station site, it will sell the same to defendant building company. This will involve a shortening of the railroad actually owned by Wheeling by something over 1,000 feet. Under the user contract, however, Wheeling trains will be operated on Terminals' tracks over the abandoned Ontario Street station site into Terminals' station, a distance of over some 1200 feet beyond the old Ontario Street station.

The proposed change will either be a shortening of Wheeling's railroad of approximately 1,000 feet or a lengthening of it some 1200 feet, depending upon whether one considers the point to which Wheeling ownership will extend or the more northerly point in Terminals' new station to which its trains will run.

Having in mind the exact effect upon Wheeling's line and operation of the proposed change, we wish to take up separately the several statutes referred to.

(a) Section 8747 of the General Code of Ohio.

This section reads as follows:

"Changes of line or termini.—By a resolution adopted by a majority of its board of directors, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, a company may change the line, or any part thereof, and either of the proposed termini, of its road. No change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed. Any subscription of stock made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change, shall be canceled at the written request of a subscriber who has not consented thereto, filed with the secretary or other chief officer of the company, within six months after such change."

It would seem clear from a mere reading of G. C. 8747 that it never was intended to apply to any such operating change as that which Wheeling now proposes to effect. The change of termini authorized by this section is one by which the terminus of the railroad was moved from one community to another, thereby depriving the original terminus of the service of the railroad. The mischief the Legislature sought to remedy by the enactment of this section lay in the fraud perpetrated upon persons who purchased or subscribed for stock on the faith that a railroad would serve a community in which such purchasers or subscribers were interested. The statute, therefore, provided that the proposed termini might not be changed without the consent of the holders of three-fourths of the stock. As to mere subscribers for stock, who had no voice in the management of the road, they were given the right to cancel their subscriptions if such subscriptions were "made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change."

If one reads such cases as *Chapman vs. Railroad*, 6 O. S. 120, and *Armstrong vs. Karschner*, 47 O. S. 276, the situation that the Legislature had in mind will be apparent. In the period when the railroads of the country were being built, a substantial part of the necessary capital was raised from persons financially interested in the development of communities which were to receive railroad service. Landowners who foresaw a considerable appreciation in the value of their lands, if railroad communication with the rest of the country were established, would readily subscribe to the shares of a railroad reaching the communities in which their holdings were situated. Such subscribers expected to profit primarily not from the dividends on the stock subscribed for, but on the appreciation of their real estate holdings in the community affected. Thus in *Chapman vs. Railroad, supra*, it appears that the proprietors of the town

of Bellevue not only subscribed to the capital stock of the railroad to be built through their town, but donated one-quarter of the lots of the town to the company.

Now, if after stock had been subscribed for or purchased by persons interested in the development of the community through which it was proposed to run the road, a change was made in its line or proposed termini whereby the particular community was deprived of the service of the road, a great wrong was done to the stockholders and subscribers interested in that community no matter how well advised the change might be from the standpoint of the railroad.

Obviously such a statute enacted for such a purpose has no application here. It is not proposed to deprive the city of Cleveland of such passenger service as the Wheeling can provide. On the contrary it is proposed to give that city far better, more convenient and comfortable passenger facilities than Wheeling could afford to furnish otherwise. Furthermore, Wheeling's passenger trains will run into and out of a station in the same down-town section of the city, a little more convenient to most business and mercantile establishments, hotels, theaters, street car lines, etc., and one which affords to Wheeling's passengers the convenient opportunity to make direct connections with the trains of other railroads and with the rapid transit lines.

The language of the Supreme Court of Ohio in *Pittsburgh & West Virginia Railway Company v. Public Utilities Commission of Ohio,* 120 O. S. 434, with reference to the application of General Code Sections 504-2 and 504-3 to the matters before this Court seems appropriate to the present question (p. 437):

> "It is clear that the proposed change in no wise involves the abandonment of facilities or service, or the withdrawal of any service or convenience heretofore provided, but that it, on the contrary, contemplates

additional service and improved passenger station facilities in the immediate vicinity. Certainly no one would argue that an application need be made to the Public Utilities Commission for permission to erect a new passenger station, or that it was contemplated to confer on the Public Utilities Commission any such jurisdiction by statute. The plan proposed is no more an abandonment of passenger station facilities than would be the substitution of a new passenger station by the Wheeling & Lake Erie upon the very location now occupied by its passenger station. In either event, the change constitutes a substitution of new and presumably improved facilities and service."

If any of Wheeling's present stockholders invested in the road for the purpose of furthering the development of the city, they cannot complain that by reason of the proposed changes such purpose has been frustrated.

But the statute in question not only does not apply to such a change of termini as that involved here, namely, the change of about 1200 feet, running the line a little farther into the center of the business section of the terminal city, but it has, we submit, no application to a change in the terminus of a road that has been completed and in operation for many years. The statute refers to a change in "either of the *proposed* termini" (emphasis ours). The Legislature was dealing with railroads in their pre-construction stage of development, a stage wherein ultimate plans and purposes are vaguely defined and easily changed. But this construction was not left to inference, as is shown by the language "no change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed." It seems clear, therefore, that Section 8747 relates only to changes of termini or lines of railroads not yet "either partly or completely constructed."

The matter of abandonment of portions of existing lines is dealt with by General Code Sections 504-2 and 504-3, which govern the abandonment of existing lines. Section 504-2 provides:

> "No railroad * * * operating any railroad in the state of Ohio * * * shall abandon * * * any main track or tracks or depot * * * or the service rendered thereby, which has once been * * * constructed, opened and used for public business * * * except as provided in Section 504-3 * * *."

Section 504-3 provides that the Public Utilities Commission of the state may, upon reasonable notice, authorize the abandonment of railroad tracks and depots and other public utilities.

When application was made by Wheeling to the Public Utilities Commission of Ohio for authority to abandon its Ontario Street station site and enter into the user contract, the Commission held that it was without jurisdiction because *inter alia* this was not an abandonment within the meaning of General Code Section 504-2. The present appellant went to the Supreme Court of Ohio on error to reverse the Commission's ruling. But the Commission was affirmed by the Supreme Court in the language above quoted. *Pittsburgh & West Virginia Railway Company vs. Public Utilities Commission of Ohio, supra.*

That the Legislature fully understood that proper occasion might arise for making minor changes in the line of a railroad which would not result in depriving any community of the road's service and which, for that reason, did not require the elaborate safeguards provided by General Code Section 8747, is indicated by General Code Section 8753, which reads as follows:

> "*For the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades,* or unsafe or unsubstantial grounds or foundations, or

when the roadbed has been injured or destroyed by the current of a river, water-course, or other *unavoidable or reasonable cause,* a company may change the location or grade, of any portion of its road, *but shall not depart from the general route prescribed in the articles of incorporation.*" (Emphasis ours.)

Elsewhere in this brief it is shown that unless the Ontario Street station site is abandoned by Wheeling, a safe and practicable approach to the union terminal from the east cannot be constructed. Hence we contend the proposed changes may fairly be said to be "for the purpose of avoiding annoyance to public travel." Furthermore, it appears, that the tracks in the station will have to be constructed upon a *dangerous grade* unless the Wheeling's line is acquired. In view of the fact that the statute does not require that the "annoyance to public travel" be limited to so much of the public travel as uses the railroad whose location is to be changed, nor is it stated that the dangerous grade to be avoided is necessarily a grade on such line of railroad, it might fairly be contended that the changes proposed to be made in Wheeling's line were sufficiently justified by either of the first two clauses of Section 8753. If, however, the Court be in doubt about that, we are clearly within the general language, "or other unavoidable or reasonable cause."

The distinction between cases where whole communities are deprived of railroad service and such changes as are here contemplated is emphasized by the concluding language of Section 8753, "but shall not depart from the *general route* prescribed in the articles of incorporation." (Italics ours.)

The language of General Code Section 8747 aptly describes and provides for the situation such as arose in the *Chapman* case, *supra,* where the change in line was a fraud upon stockholders who invested in reliance upon the road

being built into the town of Bellevue, even though amply justified from the standpoint of the railroad itself. It does not apply, we submit, either in language or intent, to such a situation as here exists.

(b) Section 8772 of the General Code of Ohio.

This section reads as follows:

> "*Extension of line, how authorized.* When a company desires to extend the line of its road beyond either of its previously designated termini, its president and directors may submit the question of such extension and change of termini to a meeting of its stockholders, to be called for that purpose by notice published for four consecutive weeks in some newspaper in general circulation in each county through or into which the road passes. If the holders of a majority of the stock, in person or by proxy, so determine, the president and directors, or a majority of them, shall make a certificate of the fact, naming the places of the new terminus or termini of the road, and the county or counties through or into which the extended line will pass, and file it in the office of the secretary of state. Such extension then shall be held to be a part of the original line of the road."

It is submitted that much of what has been said in connection with Section 8747 applies with equal force to Section 8772. The Wheeling does not propose to extend the line of its road. In fact the abandonment authorized by the Commission will shorten "the line of its road" some thousand feet. But even if the proposed operation of the Wheeling trains over the road of Terminals into the station were regarded as a physical extension of Wheeling's line, it is clearly not such an extension as is contemplated by Section 8772. The statute speaks of filing a certificate "naming the places of the new terminus or termini of the road, and the county or counties through or into which the

extended line will pass." The "new terminus" of the road is not a new "place." The terminus of the Wheeling after the proposed change will be at the same "place" as it now is, to-wit: Cleveland, Ohio, and more particularly downtown Cleveland. Furthermore, "the extended line" will not pass through or into any new county or counties.

The purpose of the statute seems clear. The physical extension of a road from a terminus in one city to a new terminus in another requires a substantial increase in the company's fixed investment—obviously a matter of some concern to the stockholders. The "extension" proposed in our case, if indeed it is not a curtailment, does not involve any increase in our fixed investment. On the contrary, it allows us to convert land that will no longer be needed or useful into $1,600,000.00 cash available for additions and betterments.

It is difficult to credit the plaintiff with good faith in vexing the Court with an objection so frivolous.

(c) Sections 8806 to 8809 inclusive of the General Code of Ohio.

These sections read as follows:

"Sec. 8806. Subscription to aid another company.—A company may aid another in the construction of its road, by means of subscription to its capital stock, or otherwise, for the purpose of forming a connection of the roads of the companies, if the road of the company so aided will not when constructed form a competing line.

Sec. 8807. Lease or purchase of another railroad. —A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies. After such purchase the purchasing company shall be vested with

all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and of branches thereto of the company from which it was purchased, including the power to acquire and appropriate property therefor, and be subject to all the duties, obligations, and restrictions of such company.

Sec. 8808. Companies not competing may make beneficial arrangements.—Two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with, and calculated to promote the objects for which they were created.

Sec. 8809. Vote of stockholders of each company requisite.—No such aid shall be furnished, nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent thereto. In case of the lease of a railroad situate in whole or part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made."

Elsewhere in this brief (pp. 19-20) we have pointed out that the Ohio Legislature, in enacting the General Code of the state, differentiated between "railroads" and "public service corporations other than railroads." Sections 8806 to 8809 inclusive are part of Chapter 1 of Subdivision I of Division II of Title IX, which chapter and subdivision deal exclusively with railroads, whereas Terminals is organized under Sections 9160 *et seq.*, which are part of Chapter 1 of Subdivision II of Division II of Title IX, which chapter and subdivision relate to "Public service corpora-

tions other than railroads." Hence we contend that when Section 8806 says that "a company may aid another in the construction of its road," it means that a railroad company may aid another railroad company as the term "railroad" is used in Subdivision I and does not mean that a railroad company may aid a union depot company such as Terminals. Likewise when Section 8807 provides that "a company may lease or purchase any part or all of a railroad constructed or in course of construction by another company," and when Section 8808 provides that "two or more companies * * * may enter into any arrangement for their common benefit," in both cases the references are to railroad companies and not to union depot companies.

The four sections of the Code above quoted, together formed originally Section 24 of the General Ohio Corporation Act of May 1, 1852, Sections 2 to 26 of which are devoted to the creation and regulation of railroad companies. It will be noted that these four sections of the Code, like the single section of the original Act from which they derive, are not prohibitory at all. On the contrary, they purport to be grants of powers.

If on examination of the contracts between Wheeling and the Erie for the temporary use of the Erie tracks and the Erie station, and between Wheeling and the Big Four for the temporary use by Wheeling of the Big Four tracks to get to the Erie station, they were regarded as aids, leases or purchases within the meaning of the sections—and we will shortly undertake to show that they are not—the sections would doubtless be applicable to those temporary contracts. In view of the facts, however, that these contracts terminate as soon as Wheeling trains are admitted to Terminals' Union Station and that our use of the Big Four tracks and the tracks and station of the Erie in the interim is at the expense of Terminals, we do not suppose that appellant would contend that this Court would

strike down so much of the Commission's certificates as relates to temporary relations with Erie and Big Four, if the certificates relating to the abandonment of our old station property and the user contracts with Terminals were sustained.

(1) Neither the User Contract nor the Proposed Sale by Wheeling of Its Old Station Site to Building, from Which Terminals Will Obtain an Easement, Is an Aid to the Cleveland Union Terminals Company Under Section 8806 of the General Code of Ohio.

The proposed sale of lands is to be made to Building, not to Terminals. But passing this point, and even if Terminals be considered a "railroad"—which however Wheeling expressly denies—it is submitted that the proposals of Wheeling do not constitute an aid to Terminals. It is not every act of a railroad company which may facilitate the construction of another company's railroad which falls within the scope of section 8806.

That there are limitations on the application of this section is indicated by the words, "by means of subscription to its capital stock, or otherwise." Here, as elsewhere, in construing statutes and other writings, it is necessary to determine the scope of the generic term by the preceding specific one. The scope to be granted "otherwise" must be determined by a consideration of "subscription to its capital stock." The specific controls the general under the principle *ejusdem generis*. The act applies to an extension of aid by means of subscription to capital stock or by other means of the same kind. It would doubtless apply to a grant of credit or to any other means which would set up a permanent inter-corporate relation between the two companies by which the one would be enabled directly or indirectly to control the management of the other.

That this permanent inter-corporate relationship was the thing which the Legislature regarded as requiring a new grant of corporate power is indicated by the sweeping limitation to the grant. The grant is restricted to the case where the railroad aiding and the railroad aided are not in competition.

If the Legislature had supposed that it was granting corporate power to execute acts which had no sequel of inter-corporate relationship, it would not have limited the grant to non-competing roads. The public policy back of the opposition to inter-corporate dependence between competitors is well established and well understood. But what difference is it to the public whether an outright sale, for example, of equipment takes place between competitors or non-competitors? Is there any public policy involved in the conveyance of a permanent right of way or the sale of locomotives and freight cars by one railroad to a competitor, provided, of course, that the vendor has not been disabled thereby in performing its public duties?

If the Legislature had supposed, we submit, that there was any necessity for a new grant of corporate power for completed transactions between railroads it would not have imposed an unqualified condition that the transaction be between non-competing roads.

The character of the limitation upon the power granted supports the conclusion arising from the specific mention of stock subscription as a means of aiding, that the Legislature intended to grant corporate power to railroad companies subject to the limitation stated to enter into continuing inter-corporate relationship for the purpose of extending aid in the construction of railroads.

Indeed it seems clear that the act does not apply to the transactions complained of, even without the specific reference in the statute to a subscription to capital stock. A sale of land necessary for the construction of a railroad may in-

deed aid the construction in the sense that it removes an obstacle to the construction, but the term "aid" has not ordinarily so broad a meaning. We do not ordinarily speak of a land owner who resists appropriation until paid the highest price that a jury will award as having "aided" the construction of a road. Neither is a steel mill, which sells rails for cash, at the market price, commonly regarded as having "aided" in the construction. If, however, it extended an unusual credit upon faith that the road would be constructed and operated profitably, it might well be said to have aided in the construction. The normal meaning of the word "aid" used in this connection suggests some common participation in the hazards and expense of construction such as is involved in the subscription of stock, the extension of credit or a loan of material.

Nothing of this sort is involved in the proposed sale of a small parcel of Wheeling's lands to Building, through which Terminals proposes to acquire an easement.

(2) Terminals Does Not Propose to "Purchase" Any Part of Wheeling's Railroad.

Even if the fact that the proposed sale is to be made to Building be ignored; and even if Terminals be considered a "railroad"—which however Wheeling expressly denies—it is submitted that the proposals of Wheeling do not constitute a sale to Terminals of a part of Wheeling's railroad. Section 8807 clearly applies only to the purchase by one railroad company of all or a substantial part of the railroad of another company. The portion of the line of railroad proposed to be abandoned by Wheeling is but 1035 feet in length, or about 4/100 of one per cent of the total mileage operated by Wheeling. Such an insignificant portion of its property, mileage considered, could not have been within the intendment of Section 8807.

There is an even stronger reason why this section does not apply to the instant case. Section 8807 primarily relates only to the lease or purchase of a part or all of a railroad *for purposes of operation*, as it provides that

> "After such purchase the purchasing company shall be vested with all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and of branches thereto of the company from which it was purchased, including the power to acquire and appropriate property therefor, and be subject to all the duties, obligations, and restrictions of such company."

But Wheeling does not propose to sell these lands to Terminals until after they are abandoned as a part of a railroad; in other words, not until they have ceased to be "any part * * * of a railroad." It is a sale of lands no longer devoted to common carrier service; no longer *a part of a railroad.*

(3) The User Contract Does Not Constitute a Lease by Terminals of a Part of Its Railroad to Wheeling.

Even if Terminals be considered a "railroad" it is submitted that the proposals of Wheeling do not constitute a lease by Terminals of a part of its railroad to Wheeling. Even a casual reading of the contract between Wheeling and Terminals (Exhibit 15) shows that it has none of the characteristics of a lease. It is a contract for the furnishing of passenger station facilities and service by Terminals to Wheeling and nothing more. Wheeling does nothing for itself after its trains reach the connection between its tracks and those of the Terminals. The handling of Wheeling's trains, the selling of its tickets, the service to its passengers are all performed by Terminals pursuant to the provisions of this contract. Wheeling acquires no interest in or right of possession of property belonging to Termi-

nals, nor does it interrupt Terminals' possession of its own property.

A lease of a railroad is an entirely different transaction from that contemplated by the contract in question. The lessor is divested of all its corporate functions so far as the portion of the road leased is concerned, its roadbed, tracks, rolling stock and other equipment—reserving only rent. The lessor wholly disables itself from performing the duties which it owes to the public as a common carrier. Such transactions have always been carefully scrutinized and regulated by law. The substantial equivalent of General Code, Section 8807, will be found in the statutes of most, if not all, states. But courts have always distinguished between railroad leases and trackage arrangements, even where one railroad has granted to another, for a long term of years, the right to operate its own trains over the granting railroad's track on terms of equality of control of operation.

In *Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Company,* 163 U. S. 564, this Court considered a contract whereby the Union Pacific had granted to the Chicago, Rock Island & Pacific "the full, equal and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the City of Council Bluffs, in the State of Iowa" and a point in South Omaha, Nebraska, including a bridge over the Missouri River, for a period of 999 years (p. 573). The claim was made by the Union Pacific that the contract was in fact a lease of part of its railroad, and that it was void under several prior decisions of this Court to the effect that a railroad company could not lease all or part of its road without specific legislative authority. This Court held that its prior decisions relative to railroad leases had

no application to the contract in question, because it merely granted trackage rights. The Court, through Mr. Chief Justice Fuller, said at pages 582 and 583:

> "The contract provided that the Pacific Company hereby 'lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks.' The possession here spoken of was such possession as the Rock Island Company would have when its engines, cars and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them. Moreover, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains coming upon a Pacific track immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subjected to the orders of the Pacific's officers. And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arrangements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis', rather than a lease."

If the contract between the Union Pacific and the Rock Island was not a lease, notwithstanding that the crews of the Rock Island trains operated them over the Union Pacific's tracks, because there was no transfer of possession, *a fortiori,* the user contract is not a lease because Terminals will control Wheeling's trains from the time they reach the eastern approach of the Terminal until they are returned to Wheeling (Exhibit 15).

The language of this Court in the *Union Pacific* case on page 585 is wholly appropriate to this case:

> "If it were true that railroad companies could not, ordinarily, without the aid of a statute, grant running facilities over their tracks even when such an arrangement would not interfere with their business, the application of so rigorous a rule to defeat a contract as between the parties, in respect of tracks in the congested parts of large cities, where the entire use of them is not required by their owners, does not seem reasonable. It is well said by Sanborn, *J.*, speaking for the Circuit Court of Appeals: 'Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other.' "

(4) THE CONTRACTS BETWEEN WHEELING AND BIG FOUR AND BETWEEN WHEELING AND ERIE DO NOT CONSTITUTE LEASES BY BIG FOUR AND ERIE OF PARTS OF THEIR RAILROADS TO WHEELING.

It is contended that the contract between Wheeling and Big Four of December 7, 1928, constitutes a lease by Big Four of a part of its railroad to Wheeling and that the contract of the same date between Wheeling and Erie constitutes a lease by Erie of a part of its railroad to Wheeling. These agreements are in evidence as Exhibits Nos. 17 and 16 and an examination of them will reveal that the contract with the Big Four provides for nothing more than a trackage right over certain tracks intervening between Wheeling's main line and the Superior Avenue station of the Erie. The claim that such a trackage right constitutes a lease is definitely disposed of by the case of *Union Pacific Railway Company v. Chicago, Rock Island & Pacific Railway Company, supra.* The contract with the Erie provides

right over its tracks intervening be-
for a similar trackage ri line and the Superior Avenue sta-
tween Wheeling's main brovides for the temporary furnish-
tion of the Erie and pron facilities and service to Wheeling
ing of passenger station station; facilities and service which
in the Superior Avenue sbe furnished in the union station of
are similar to those to be *Pacific* case likewise disposes of
Terminals. The *Union* ract constitutes a lease to Wheeling
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T OF DECEMBER 7, 1928, CONSTITUTE

(5) IF THE AGREEMENT THE COMMON BENEFIT OF WHEELING, ARRANGEMENTS FOR TMINALS THEY DO NOT REQUIRE STOCK- BIG FOUR AND TERMI. KOLDERS' APPROVAL.

It is contended by pl plaintiff that the agreements of De-
cember 7, 1928, constitu tute arrangements for the common
benefit of Wheeling, Big g Four and Terminals. Even if this
contention were true, th the agreements do not require the
vote of stockholders refe ferred to in Section 8809. That sec-
tion provides "no such aid shall be furnished, nor any pur-
chase or lease perfected aid" until authorized by the holders
of two-thirds of the st stock of each company. Arrange-
ments for the common b benefit of two railroad companies,
although the subject of S Section 8808, are not referred to in
Section 8809 and certa only therefore require no stockhold-
ers' approval.

10. THE CONSIDERATION OF $1,600,000 SPECIFIED IN THE OPTION CONTRACT IS AN ADEQUATE PRICE FOR THE SALE OF WHEELING'S INTEREST IN LANDS NORTHERLY OF EAGLE AVENUE.

In Point X of its brief appellant contends that the consideration of $1,600,000 specified in the option contract (Exhibit 11) between Wheeling and The Cleveland Terminals Building Company is inadequate.

Wheeling consistently urged before the Commission and before the District Court that the Commission was without jurisdiction to pass upon the adequacy of the consideration named in the option contract, for the reason that the Commission's jurisdiction under paragraphs (18) to (22) of Section 1, Title 49, U. S. C. is limited to the question of whether or not the public convenience and necessity permit or require the abandonment of Wheeling's lands northerly of Eagle Avenue for common carrier service, and that this statute confers upon the Commission no power to pass upon the question of the price to be received by Wheeling for these lands after abandonment had been effected. It goes without saying that the Commission would have no power to pass upon the price at which Wheeling might sell a tract of land owned by it, but not used in common carrier service, or other non-carrier property, such as an office building, an amusement park, obsolete equipment withdrawn from service, or any other property which had never been used for the service of the public or had been finally retired from such service. Such was apparently the view of the Commission for it said (R. 53):

> "The protestant herein does not undertake to show in what manner the public convenience and necessity are affected by the sale of the properties involved in Finance Docket No. 7299, but contends that where the abandonment and sale are involved in the same general transaction we should see that the applicant receives a fair and reasonable value for the property be-

fore permitting abandonment. In view of the plain wording of the statute we are of the opinion that on the facts shown by this record we are without jurisdiction to prescribe the price at which the applicant in these proceedings must dispose of its properties after abandonment."

However, at the second hearing before the Commission appellant was permitted to introduce testimony as to the value of a hypothetical area of land northerly of Eagle Avenue, commonly referred to as the "adjusted area," which resulted in the introduction of rebuttal testimony on behalf of Terminals and of Wheeling as to the value of Wheeling's actual interest in lands northerly of Eagle Avenue and of the value of this hypothetical adjusted area. Therefore, in view of the fact that this issue has been tendered by appellant's brief, it is appropriate to discuss at some length the facts bearing upon the values of Wheeling's actual interest in lands northerly of Eagle Avenue, and of the so-called adjusted area.

Wheeling occupies lands northerly of Eagle Avenue of a total area of about 80,457 square feet, of which it owns in fee about 74,780 square feet, shown outlined in yellow on Exhibit 3. It holds the balance of 5677 square feet (shown outlined in red on Exhibit 3) under a 99 year reappraisal lease expiring in April 1991. These fee lands and leased lands abut upon Canal Road, Huron Road and Canal Road Extension, known as Vinegar Hill (Ex. 11, p. 6). None of these streets have been vacated (R. 267). The consideration of $1,600,000 specified in the option contract covers Wheeling's interest in the fee lands, the leased lands and its reversionary interest in the streets upon which its fee lands abut. Exhibit 11, the option contract, sets forth specific descriptions of the fee lands and the leased lands and contains the following option (p. 7):

"For and in consideration of the sum of Ten Dollars ($10.00) to it in hand paid by the Railway Com-

pany the Building Company gives to the Railway Company the following option:

That for the period of five years from the date of the execution hereof the Railway Company shall have the option upon ten (10) days' notice in writing given to the Building Company at the latter's principal office in the City of Cleveland, Ohio, to require the Building Company

(a) upon tender of conveyance and assignment or release and evidences of title hereinafter provided for, to pay to the Railway Company the sum of One Million Six Hundred Thousand Dollars ($1,600,000) in gold coin of the United States of America or its equivalent as a consideration for the execution and delivery of the conveyance and assignment or release hereinafter provided for; and

(b) to accept a conveyance to the Building Company or to its nominee of said fee lands by special warranty deed warranting the same to be free and clear of all encumbrances placed thereon by or through the Railway Company or by or through its predecessor company or companies, and to accept a quitclaim deed to the Grantee therein named of all of the right, title and interest of the Railway Company in any lands in the streets upon which said fee lands abut; and

(c) to accept an assignment of the leasehold estate created by said lease, dated April 25, 1892, free and clear of all the liens and encumbrances placed thereon by or through the Railway Company or by or through its predecessor company or companies, as shown by the statements of title prepared for and at the instance of the parties to said conveyance and assignment, to be provided by the Railway Company."

It is pertinent to inquire how this consideration of $1,600,000 was determined by Wheeling's officials. For an answer to this question it is necessary to advert to the negotiations between the parties for the use by Wheeling of the union depot of Terminals and the use by Terminals of

Wheeling's lands northerly of Eagle Avenue, which had proceeded at intervals from about 1918 to 1924 (R. 275-279). In October of the latter year—which, be it noted, was more than two years before the New York Central, Baltimore & Ohio, and Nickel Plate, or any of them, acquired any interest in Wheeling—a conference occurred between Mr. Duncan, representing the Wheeling, and Mr. O. P. Van Sweringen, representing Terminals, concerning, among other things, the division of the lands in the streets which would revert to both parties in the event these streets were vacated as a result of the Terminal project. As a result of this conference, a tentative memorandum was dictated by Mr. Duncan providing that the lands so to be vacated should be divided equally between Terminals and Wheeling, subject to some minor adjustments. This conference proceeded upon the assumption that Terminals would be granted an easement across Wheeling's lands, and the tentative memorandum so stated (R. 279-281).

The acceptance of the Eagle Avenue Ramp Ordinance by Terminals rendered impossible the joint use of Wheeling's property by Terminals and Wheeling. This resulted in a change of negotiations looking to the sale by Wheeling of its interest in such property in lieu of the granting of an easement to Terminals. The manner in which Wheeling determined the consideration to be received by it for its interest in these lands is explained by the following excerpts from Exhibit 48, introduced by Terminals, which is the report of Wheeling's management to its Executive Committee:

> "The Terminals Company in order to reach its station from the east, i. e., in order to construct what is called its 'east approach' will require practically all of the property referred to above, (Executive Committee Exhibit No. 1). The project in its present form is more elaborate than when originally projected in 1918, when it would have required a lesser portion of

the Wheeling's property and in a manner that would permit the Wheeling to reconstruct its station over and above the Terminals Company's then proposed tracks. However, the Terminals project has, at all times, required the vacation of Vinegar Hill and the projected portion of Huron Road west of the west line of Ontario Street. The streets proposed to be vacated are shown in solid green on Executive Committee Exhibit No. 2, and the Wheeling at all times, as an abutting property owner, has been entitled to its proper share of the area vacated. The Terminals Company and the Wheeling own all the abutting property. The irregular shape and character of the property has caused considerable difficulty in reaching a conclusion respecting the division of the street areas to be vacated. Early in 1926 a tentative theory was adopted, (not binding upon either) for such purpose, viz., that (a) the vacated portion should be divided as nearly as practical into two equal parts, one to revert to the Wheeling and one to revert to the Terminals Company; (b) the irregular parcel of the Wheeling extending into the area of Huron Road as projected over the hill, and originally so dedicated, should be treated as 75% belonging to the Wheeling and 25% in Huron Road; and (c) that the Wheeling should contribute 25% of a certain strip fronting on Ontario Street, shown hatched in black on Executive Committee Exhibit No. 3, for the purpose of widening Ontario Street at this point as required by the City and for the extension of Huron Road; (b) and (c) being in settlement of a controversy as to the ownership of such irregular piece. The engineers for the respective parties worked for a long time to determine the exact area to be vacated and the location of the portion to be received by each, but reached an impasse some time in the fall of 1927. The Terminals Company then inquired if the Wheeling would take in lieu of a portion of the area in the vacated streets to which it might be entitled, an equivalent area with a frontage on Ontario Street, commencing south of the Wheeling's *owned property* lying northwest of, and adjoining, a portion of it not having

Ontario Street frontage, the effect of which would be to give Ontario Street outlet to a considerable area which did not previously have such advantage, thereby materially increasing its value, as will be observed by a comparison of Executive Committee Exhibit No. 1 and Executive Committee Exhibit No. 3, the area being cross-hatched in yellow being exchanged for an equal area, tinted in solid green, square foot for a square foot without reference to value. The Terminals Company was advised that such an arrangement might be agreeable, but with the understanding that it should be treated as tentative and depending upon the solution of the station problem. Again the engineering departments were unable to agree as to the boundary lines of the exchanged land, because of the dispute as to vacated area—see note on Executive Committee Exhibit No. 3. The Wheeling suggested that if it should sell its property now owned or leased that the value should be calculated on the basis of the boundary lines of the adjusted area, which is shown in solid yellow on Executive Committee Exhibit No. 4, and which contains a total area of 109,341 square feet against an original area of 74,780 square feet owned and 5,677 square feet under lease. The Management recommends the acceptance of the new boundary lines, containing the piece of property shown in solid yellow on Executive Committee Exhibit No. 4, and containing 109,341 square feet.

* * * * *

"(5) The adjustment of the boundary lines of the property of the parties agreed upon in the manner herein set forth results in the Wheeling having an area of 109,341 square feet, of which 74,515 square feet, for convenience in reference, is termed 'building site area,' and 34,826 square feet is termed 'right-of-way site,' (See Executive Committee Exhibit No. 4). An inspection of this Exhibit and of the premises will indicate some of the difficulties to be experienced in reaching a sound conclusion as to the proper utilization and/or value of such a piece of property. The matter

has been approached from several angles; First, we have considered (against the amount which can probably be obtained for it in an outright sale, and the probable earnings thereon) its utility, and resultant value, from the standpoint of the use to which the Wheeling might devote it; i. e., railroad tracks, station and/or office building and industries to be served (there are none to be served, as the property previously occupied for industrial purposes, and which were served by the Wheeling, is now owned by the Terminals Company and is not occupied by industries). In this connection careful consideration was given to the probable cost of reconstructing and operating our passenger facilities at, or near, the location of our present station as against the terms offered the Wheeling to furnish it with passenger facilities in the new Terminal Station. Second, careful study was made of the possibilities of profitably utilizing this land, particularly the building area for a large loft and office building, and, in so doing, advantage was taken of information obtained from those familiar with such uses and costs of construction, operating costs and possibility of renting and the probable income (which was checked by the Management in various ways). The study indicated the necessity of an expenditure of a considerable amount of money ($3,000,000 to $4,000,000) which, in the opinion of the Management, is neither prudent nor advisable. After giving full consideration to all the facts in connection with, and pertinent to, the matter the conclusion reached is that the Wheeling will derive more benefit by selling, or leasing, this property than it could by attempting to utilize it. Having reached such conclusion we (a) discussed the matter with various persons; (b) secured the written opinion of realtors and others; (c) conferred with counsel, who has in the times past and recently represented in litigation the owners of lands in the vicinity and has also negotiated with the Terminals Company in the sale of land, seeking such advice from a legal rather than a real estate standpoint, as it is thought that such counsel would be helpful in determining the price which, in his

judgment, should be obtained rather than to submit the determination thereof to a jury in a condemnation suit; and (d) checked the recent sale price of adjacent and adjoining property, extending such prices by the Zangerle method to the Wheeling's property resulting in various values running from $1,100,000 (which the Terminals Company insists is the high value), to $1,600,000, as fixed by V. C. Taylor & Sons. Other values might be obtained by taking some small portion of land and applying the square foot cost to the entire area, but this, in the opinion of those familiar with such matters, would be subject to the fair criticism that it failed to give weight and effect to a considerable area which could not properly be considered as being within the zone of higher values. Third, it might be suggested that a fair market value does not represent the amount the Wheeling should exact from the Terminals Company in the present instance, because the Terminals Company must have the property if it is to complete its project; and, that there is a possibility a situation has been created whereby it has no power to acquire an easement across the land by condemnation proceedings. Such mode of procedure has not been given consideration, because it has not appeared to be sound, either in morals nor in law.

"Taking everything into consideration, the Management recommends that the property be valued at $1,600,000 for either sale or lease purposes."

When the above quoted excerpts from Exhibit 48 are read in connection with the four maps attached to the exhibit, entitled respectively, Executive Committee Exhibits Nos. 1 to 4, inclusive, it readily appears that the so-called adjusted area shown in solid yellow on Map 4 (Executive Committee Exhibit No. 4) is a parcel which is more appropriately shaped and of greater utility than the parcel which would result from adding to property owned by Wheeling in fee its proportion of the areas proposed to be vacated, shown in solid green on Map 2 (Executive Committee exhibit No. 2). It is obvious that if the street areas were

vacated and Wheeling received the accretions which would naturally revert to its fee lands, it would still be left with a long narrow strip of land, irregular in shape, with a limited frontage on Ontario Street, and of a utility and value much less than the adjusted area, shown in solid yellow on Map 4. But it must be constantly borne in mind that the so-called adjusted area is not now owned by Wheeling and never has been so owned; that Wheeling has no right either by contract or otherwise to acquire the adjusted area and that at best it is but a hypothetical parcel of land used in the negotiations between Wheeling and the Terminals interests looking to a possible division and reshaping of the lands surrounding Wheeling's property in the event the vacations were effected. All that Wheeling could convey under the option contract is its title to the fee lands, of an area of 74,780 square feet (shown in solid yellow on Map 2 of Exhibit 48), the interest in the leased lands, of an area of 5677 square feet (outlined in brown upon the same map), plus a quit claim to any interest it may have in the adjoining streets to be vacated (shown in solid green on that map).

What does the record show as to the value of these lands which constitute the subject matter of the option contract? In rebuttal of appellant's evidence as to land values, Terminals introduced three witnesses, Messrs. John D. Fackler, Stanley L. McMichael and Joseph Laronge, all eminently qualified to appraise the lands covered by the option contract. To detail these qualifications here would unduly enlarge this brief. It is sufficient to refer to the outline of their qualifications at the following pages of the record:

John D. Fackler, 423-425, 427-428;
Stanley L. McMichael, 438-440, 442;
Joseph Laronge, 453-457.

With a rich background of experience in buying, selling, and leasing real estate in down-town Cleveland, each of these witnesses studied the value of Wheeling's interest in lands northerly of Eagle Avenue and arrived at the following values, respectively, of such interest, as of July 3, 1928:

John D. Fackler, $814,000 (R. 429);
Stanley L. McMichael, $828,843.73 (R. 443);
Joseph Laronge, $700,023 (R. 460).

These appraisals find support in the valuation placed upon the same lands by Raymond T. Cragin, another experienced real estate man, introduced as a rebuttal witness by Wheeling, who appraised Wheeling's interest in these lands at $877,473 (R. 465).

Description of Wheeling's Lands Northerly of Eagle Avenue.

The lands owned by Wheeling northerly of Eagle Avenue consist of a long narrow strip on a side hill east of the terminal area. The length of this strip is about 1035 feet and its area is 74,780 square feet, and the average width is 72.25 feet (Ex. 48).

This parcel is colored in yellow on Map 1, Exhibit 48.

Adjoining these fee lands is a parcel with an area of 5677 square feet, leased by Wheeling under a 99 year lease expiring April 1991. This leased parcel has a frontage of 120.13 feet on Ontario Street and an average depth of about 47 feet. It is outlined in brown on Map 1, Exhibit 48.

Wheeling's lands lie at a level intermediate between Ontario Street and Canal Road, being about 25 feet below the level of Ontario Street and 15 to 20 feet above the level of Canal Street (R. 300).

Wheeling's Lands Do Not Partake of the Values of High Grade Retail Business Properties.

The evidence shows that Wheeling's lands do not partake of the values of the high grade retail business properties. The peak of real estate values in Cleveland is on Euclid Avenue extending from East 4th Street to East 9th Street (R. 440, 455). The east side of Ontario Street across from Wheeling's property, at its best, was a small business trading street with a foreign clientele. The west side of Ontario Street just north of Wheeling's station was the well-known flop house district of Cleveland, a very dilapidated district with no buying power, and commanding extremely low rentals (R. 441, 448). It is of course obvious that such a condition cut off Wheeling's property from the influence of the high values at the corner of Ontario Street and the Public Square, and the record so shows (R. 455).

Wheeling's property is not as good as the property directly across Ontario Street because there is nothing in the territory south of it from which to draw. This territory is a dead area due to the fact that Canal Street is down in the flats and that the river is adjacent with no passageway across it. There is no originating traffic or trade coming from that territory. Traffic on the other side of the river must go up to Eagle Avenue to get across on a ramp or down to the west of Wheeling's property, and competitors would get that trade before it reached Wheeling's property. Any property on one side of a street that has a dead area back of it will show a differentiation in value from a side of the street, such as the easterly side of Ontario Street, which has surrounding it and on all sides of it a traffic originating area (R. 433).

It is illogical to assume that the value of Wheeling's property will be enhanced by the new Superior Avenue-

Lorain Viaduct, as experience has shown that property at a bridge head does not enjoy increased values from the traffic flowing over the bridge (R. 433).

Sales Prices and Tax Values of Adjacent Lands.

It requires no citation of authorities to show that sales of lands in the vicinity of the lands under appraisal constitute cogent evidence of the latter's value. Of secondary importance are the tax values of the lands in the vicinity—at least such tax values clearly indicate the relationship of values, even though they may be on a basis less than 100 per cent of the true value. Exhibit No. 135 (a revision of Exhibit No. 123) shows the cost of each of the respective properties purchased for the terminal development on the west side of Ontario Street beginning with the Public Square and running eastwardly to Superior Avenue. The locations of the purchases referred to by number on the exhibit are indicated upon Map Exhibit No. 124 by corresponding numbers (R. 405, 415). Exhibit No. 125 shows the tax values of the parcels shown on Exhibit No. 135 except as to Parcels Nos. 72 and 73 (lands owned and leased by Wheeling) for which the County Auditor does not carry a separate valuation. In both exhibits, No. 135 and No. 125, the property at the Public Square and Ontario Street (Parcel No. 17) appears at the top of the list and the properties run eastward to the property at Central Avenue, which appears at the bottom of the list (R. 406). The following tabulation consolidates the information shown on Exhibits 135 and 125:

Comparison of Costs of Lands Acquired by The Cleveland Union Terminals Company and/or The Cleveland Terminals Building Company on the Westerly Side of Ontario Street from the Public Square to Central Avenue with the 1928 Tax Valuation Thereof.

Parcel No.	Name	Ft. Front Ontario	Sq. Ft. Area	Cost	Tax Value	Cost Per Foot Front Ont.	Tax Value Per Foot Front Ont.	Cost Per Sq. Ft.	Tax Value Sq. Ft.
17	May	21	1407	$370,000.00	$255,480.00	$17,619.00	$12,165.00	$262.97	$181.57
18	Kyser Webb	21.25	1424	232,197.50	171,740.00	10,927.00	9,081.88	163.03	120.60
19	Kendal	21	1414	170,000.00	133,850.00	8,090.00	6,374.00	120.22	94.66
20	Ont. Realty Co.	21	1415	231,500.00	112,730.00	11,023.81	5,368.10	163.60	79.66
21	Skinner	40	4800	420,000.00	206,180.00	10,500.00	5,154.50	87.00	42.95
22	Sackett	40	4800	240,000.00	207,920.00	6,000.00	5,198.00	50.00	43.31
39	Mayer	23	2300	213,621.70	99,780.00	9,287.90	4,338.26	92.85	43.38
40	Backus	22.5	2250	190,406.10	71,570.00	8,462.50	3,180.89	81.02	31.81
41	Davis & Hunt	46.5	4650	436,531.30	187,420.00	9,366.26	4,030.75	93.87	40.31
42 48	Keller	47.75 22 Pros.	4298 2486	215,000.00	.....	.....	.....	31.70	.....
43	Brush	65.25	5873	200,000.00	110,450.00	3,065.13	1,694.09	34.05	18.79
44	Walsh & McGuire	21.7	1980	83,000.00	32,670.00	3,920.64	1,505.53	43.57	16.50
45-A 45-B 45-C	Lederer " "	25 32 Howe Ave.	9625	265,000.00	.....	.....	.....	27.53	.....
46	Smies	17	1538	50,000.00	26,310.00	2,941.17	1,547.64	32.51	17.10
47	Hoyt	17	1555	55,000.00	30,070.00	3,235.30	1,764.70	35.37	19.33
66	Brown	70.83	12041	210,000.00	117,380.00	2,964.84	1,667.80	17.44	9.74
63-A	Ont. St. Land. Co.	132.86	24048	280,000.00	198,190.00	2,107.48	1,491.72	11.64	8.24
67	Parsons	166.31	39600	639,000.00	219,300.00	3,842.22	1,318.62	16.14	5.54
73	Walworth-W&LE	120.13	5677	168,500.00	.....	1,404.00	.....	29.68	.....
74	Walworth-Swift	121.34	7766	300,000.00	68,660.00	2,472.39	565.84	38.63	8.82
75	Walworth-Kobl.	79.88	6860	192,000.00	50,860.00	2,403.50	635.57	28.00	7.41
76	Maschke	20	1542	23,355.33	12,370.00	1,167.76	618.50	15.14	8.02
78	Walworth-Morr.	70.79	7790	189,500.00	47,390.00	2,677.00	669.43	24.33	6.08
79	Felix	60	7352	97,000.00	42,610.00	1,616.67	710.16	13.19	5.80
81	YWCA-Schildhauer	51.5	6476	113,600.00	36,870.00	2,205.82	715.92	17.54	5.69
82 94	Keller "	20.8 150	2678 19800	145,000.00	.....	629.41	.....	4.68	.....
83	WCTU	121.73	12585	100,000.00	70,590.00	821.49	579.89	7.95	5.60
84	Ives	106.86	20104	212,500.00	86,330.00	1,988.58	807.87	10.57	4.29
86	Spear	80.5	10726	42,350.00	47,130.00	526.00	585.96	3.92	4.43
87	Howe	40	5280	37,333.00	21,000.00	933.33	525.00	7.07	3.97
88/89	Payne	40	5280	40,000.00	19,390.00	1,000.00	484.75	7.57	3.67
90	Jacobs	35	4620	35,000.00	19,190.00	1,000.00	548.28	7.57	4.15
93	Babin	35	4620	33,716.00	17,810.00	963.31	508.85	7.30	3.85

The cost to the purchaser of acquiring the lands shown in the above tabulation includes many costs other than the cost of the bare land, such as the building and equipment of the meat distributing plant of Swift & Company (Parcel No. 74), the very expensive building of the Higgins-Babcock Company (Parcel No. 67), the Mayer-Marks Furniture Store building and equipment (Parcel No. 42), the Brown Brothers Furniture Store, including office partitions and freight and passenger elevators (Parcel No. 66), the Jefferson Building, a second-hand furniture store building (Parcel No. 75), the Davis & Hunt Building and store equipment (Parcel No. 41), the Morris Company building and meat distributing equipment (Parcel No. 78) (R. 421-422, 414, 415, 417). These purchases should be construed in the light of the fact that they were purchases by one who had to purchase and must therefore be regarded as upon a higher basis than sales of land between a willing seller and a willing buyer. Even upon this inflated basis, it clearly appears from the consolidated statement that the values of the lands recede rapidly as one progresses from the corner of Ontario Street and the Public Square to the Wheeling property. Parcel No. 73, the land leased by Wheeling, has a frontage of 120.13 feet on Ontario Street and an average depth of about 47 feet, obviously far more valuable per square foot than the average of Wheeling's lands northerly of Eagle Avenue; yet the fee of this parcel sold at but $29.68 per square foot, subject to Wheeling's 99 year reappraisal lease, which the uncontradicted testimony shows to be of but little value on account of the reappraisal feature (R. 429-430, 452). The value of Wheeling's lands is of course influenced by the property to the east as well as property to the west, and it is significant that after allowing for the fact that the purchase price of Parcels No. 74 and No. 75 covered buildings and equipment as well as land, the recession in values south of

Wheeling's frontage on Ontario Street continues rapidly. It is interesting to note that the tax values per square foot which show at least the relationship of values among these several parcels follow the same trends as the sale prices.

In the face of these facts appellant's argument as to the proximity of Wheeling's lands to the Public Square and the heart of the terminal development near the Public Square and Ontario Street has little significance. Wheeling's lands are not in the zones of high values.

Wheeling's Lands Are Available for Only Limited Uses.

Wheeling's lands are available for only limited uses, such as a rather low grade of retail business or possibly a wholesale business with a track entry in the rear (R. 432); for a store building of two or three stories fronting on Ontario Street with the use of the basement for storage, having a development of space suitable for wholesaling of some kind (R. 442-443); or for a building with a maximum height of two stories, the first floor to be devoted to commercial space and the second floor to office space of the cheaper type where partitions are not required and a large unit of space is desired (R. 459).

The placing of a department store on Wheeling's property with a warehouse attached is an impossible development, even if it were connected by a subway to the Medical Arts Building and to the Terminal (R. 450). Development for a theater is likewise impossible (R. 460).

Wheeling's Lands Would Not Benefit Materially from Pedestrian Traffic in the Terminal Area.

Appellant's contention that Wheeling's lands are worth in excess of $7,000,000 is also based upon the claim that these lands would benefit from the presence of large numbers of people who would be brought into the terminal

area by the operation of the union station, and the availability of Wheeling's premises for air-right development. The overwhelming evidence upon both of these points is opposed to these contentions of appellant. It is clearly shown that the pedestrian traffic which Terminals would bring into its depot will not be disgorged at a point that will be of any benefit to Wheeling's property, and that it will not turn into the neighborhood of Wheeling's property, but will go to the office buildings and the shopping district. Even if a tunnel were constructed between the union terminal and Wheeling's property, pedestrians would not use it, as the distance is too great (R. 434-435). There is no situation either existing or proposed which would cause people to walk back from the union station to the Wheeling's property or past it, either on the sidewalks or by a tunnel, unless in the routing of street cars into the terminal there is no stop less than a half mile out from the terminal. On the contrary, it is contemplated that the only magnet (the Central Market) which now attracts pedestrians to the vicinity of the union station will be removed (R. 468).

The Development of Air Rights Over Wheeling's Lands is Impracticable.

The testimony offered by appellant as to the value of Wheeling's lands is predicated largely upon the assumption that these lands are available for air right development, that is, for the construction of buildings over the tracks, turn-outs and cross-overs of Terminals, which will be constructed across these lands at elevation 52, city datum. It is significant that appellant offered no engineer to testify to the feasibility of such a development, but relied solely upon two Cleveland real estate men who had made some study of air rights in Chicago, New York, and Philadelphia, but had apparently had no actual experience

with them. These witnesses disclosed no engineering qualifications. They merely assumed that this property might be utilized for the development of air rights without realizing the extraordinary difficulties and expense which would be incident to such a development.

But the record is not barren upon this point. The testimony of Mr. Joshua D'Esposito (R. 364-387), an engineer with long experience in the construction of railroad terminals, and considerable experience in the matter of construction of buildings on air rights, shows conclusively that on account of the very complicated system of tracks, turn-outs and crossovers, constituting the easterly throat of the Terminal to be constructed on Wheeling's lands it would be extremely expensive and highly inadvisable to construct upon these lands the necessary caissons, columns and girders to carry a commercial building overhead. His testimony (R. 369-370) shows that the system of tracks at this point is so complex and that the movements that they control in the station are so important that nothing should be erected there which will prevent changes that may be dictated as a result of experience in operating the terminal. The placing of pillars in the throat of this station would create a rigidity in the facilities which could not be overcome or avoided, except at a very great cost. Changes in equipment are certain to occur, which may require changes in fixed facilities, and actual operating experience may require a considerable revision of turn-outs and tracks in the throat of the terminal (R. 370-372). Mr. D'Esposito showed clearly that if the air elevations were to be utilized for erecting and maintaining a building the entire track layout, constituting the throat of the station area, must be spanned by steel girders carried clear over such tracks, varying in length from 80 feet to possibly 150 feet or 160 feet, creating a cost to produce this special support, in addition to the

normal development, of approximately $20 per square foot. From an economic standpoint a structure that would involve such costly elements would be very uneconomical and unsuitable (R. 372). It is shown (R. 436) that free land and better land can be bought across the street from Wheeling's property for less per square foot than it would cost to prepare Wheeling's lands for the construction of a building on air rights.

The Value of the Adjusted Area is Not to Exceed $1,600,000.

Appellant's argument proceeds at all times upon the assumption that what Wheeling owns is not what Wheeling has taken an option to sell, but an entirely different parcel, that is, the so-called adjusted area of 109,341 square feet. Wheeling does not own the adjusted area and never has owned it; hence it can give no title to it. Nevertheless, upon appellant's own assumption, the overwhelming testimony in this proceeding is that the adjusted area, with its increased size and vastly enlarged frontage on Ontario Street and Huron Road, is worth not to exceed $1,600,000. Such is the testimony of Messrs. Fackler, McMichael, Laronge and Cragin, as well as that of two other highly qualified real estate men introduced as rebuttal witnesses by Wheeling. The respective appraisals by these six men of the adjusted area are as follows:

John D. Fackler.....$1,374,796, (R. 431)
Stanley L. McMichael.$1,466,107.62,(R. 451);
Joseph Laronge .....$1,441,843, (R. 461);
Raymond T. Cragin..$1,575,000, (R. 465, 466; Ex. 148);
Alexander S. Taylor.$1,600,000, (R. 473; Ex. 149);
A. A. McCaslin.....$1,418,598, (R. 478; Ex. 150).

It seems unnecessary to elaborate further the argument as to the value of Wheeling's lands. Suffice it to say that whether it be assumed that Wheeling is proposing to

sell only the property northerly of Eagle Avenue, in which it has an interest, or whether it be assumed that it is proposing to sell the hypothetical parcel of land, known as the adjusted area, it is inconceivable that any finding could be made that the price of $1,600,000 was inadequate.

While the District Court apparently treated the option contract (Exhibit 11) and the user contract (Exhibit 15) as interdependent, and upheld the Commission's finding of public convenience and necessity upon this theory, *non constat* that the Court would have reached a different conclusion had it regarded the contracts as independent, and, as pointed out heretofore in this brief, it would have been entirely justified in so holding.

While the foregoing discussion of the values of Wheeling's lands northerly of Eagle Avenue has covered a number of the arguments advanced by appellant under Point X of its brief, it seems appropriate to invite the Court's attention to several misstatements contained in that section of appellant's brief; for example, at page 111 appellant states that appraisers who testified for Wheeling and Terminals were unfamiliar with the effect of railroad terminal development upon adjoining property or with the value and uses of air rights. Again, at page 115 appellant states that these witnesses frankly admitted that they failed to consider the value of Wheeling's property in view of the terminal development as it existed on July 3, 1928, and as the plans of it were then known to be. Such statements are directly opposed to the testimony. It clearly appears that these witnesses were familiar with these matters, and took them into account, so far as they applied to this property. For example, see Fackler (R. 427, 435-436); McMichael (R. 443, 447, 452); Laronge (R. 458-459); Cragin (R. 469); Taylor (R. 475); McCaslin (R. 478).

The attempt to spread over all of the lands in the building site portion of the adjusted area the theoretical

value which appellant develops for the leased parcel of 5677 square feet does violence to recognized principles of real estate appraising. This leased parcel has a depth of but 47 feet and a frontage on Ontario Street of 120.13 feet. Messrs. Fackler (R. 429), McMichael (R. 444) and Laronge (R. 462) appraised this frontage at $2000 a foot for a depth of 100 feet, but as the property was but 47 feet deep gave this 47 feet about 70 per cent of the foot front value based upon the familiar rules of so-called depth tables. Obviously, the square foot value thus obtained could not be spread back over property with a much greater depth such as the building site portion of the adjusted area; and the specific appraisals of the adjusted area made by Messrs. Fackler, McMichael and Laronge, as well as by Messrs. Cragin, Taylor and McCaslin, dispose of such a theory of real estate valuation.

11. THE USER CONTRACT AND THE OPTION CONTRACT ARE NOT INVALID BECAUSE THEY WERE AUTHORIZED BY DIRECTORS ELECTED BY THE VOTES OF CENTRAL AND NICKEL PLATE, WHO ARE STOCKHOLDERS OF TERMINALS.

Sub-section (j) of section XLVII of the amended bill of complaint charges that the action of the Wheeling directors with reference to the contracts before this Court was invalid because of the adverse interest of some of the stockholders who voted for the directors. In the interest of simplicity we will discuss the objection as if Terminals itself held and voted the stock instead of Central and Nickel Plate.

If plaintiff's contention is correct, it would never be possible for a corporation to contract with the holders of a majority of its stock for in every such case a majority at least of the directors would owe their election to persons intersted adversely to the corporation.

It will be apparent, we think, upon reflection, that plaintiff's contention in this respect is unsound. The matter is discussed in *Fletcher, Cyc. Corporations,* section 4030, volume 6, pages 6840, 6841.

The vice of plaintiff's contention is that it assumes that directors are necessarily controlled by the stockholders to whom they owe their elections. This error has been pointed out by the courts.

In *Rogers v. Nashville, etc. Ry. Co.,* 91 Fed. 299, in which a minority stockholder sought to set aside a contract made with the railroad's controlling stockholder, Judge Lurton, speaking for the Circuit Court of Appeals, Sixth Circuit, said (p. 313):

> "That the directors of the Nashville, Chattanooga & St. Louis Railway Company were elected by this holder of a majority of the stock does not make them agents of that interest, *nor raise any legal presumption that they are or will be unfaithful to the true and general interests of the corporation whose powers they exercise.* * * * Inasmuch as a stockholder is not a trustee and holds and acts for himself alone, there is no rule which forbids his contracting with his own company." (Italics ours.)

In *Rothchild v. Memphis & C. R. Co.,* 113 Fed. 476, the same court distinguished between the potential control that every majority stockholder has and the actual domination that he may or may not acquire. The court said at pages 480, 481:

> "But the proofs lack the essential elements of control and mismanagement, without which the relief could not be given, even if the bill had been seasonably filed. The allegations of control, mismanagement, and fraud are emphasized throughout the bill of complaint, but seem to be wholly lacking in the proof, the complainant apparently relying on the position that, when it is shown that a person holding a majority of the stock of a corporation purchases all of its property,

there is a presumption of fraud which makes him a trustee for all of the stockholders, and proof of fraud becomes unnecessary. No case in the large number cited by counsel for the complainant justifies this position. In each one there had been actual fraud in the control and mismanagement of the property for the purpose of bringing about its acquisition by the majority stockholder. It is true that every transaction of a majority stockholder with the corporation will be viewed by the courts with jealousy, and set aside on slight grounds; but it is not void, and, if the relations of the majority stockholder are fair and open, there is no rule which forbids his dealing with the corporation, and no presumption that such dealing is fraudulent. The actual control of the property, which is the basis in all of the cases of the trust relation, not existing, and the sale not having been brought about by the fraudulent action of the defendant, it did not, by its purchase, become a trustee for the complainant and other stockholders of the Memphis & Charleston Railroad Company."

See also *Ryan v. Williams,* 100 Fed. 172;
Hanchett v. Blair, 100 Fed. 817.

In *Leavenworth County Commissioners v. Chicago etc. Ry. Co.,* 134 U. S. 688, it was contended by the minority stockholders that a mortgage of the company had been foreclosed fraudulently by the company's principal stockholder. The Supreme Court approved of the following language of Mr. Justice Miller in the Circuit Court (page 707):

"If it could be shown that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of the Southwestern Company to meet its obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of

the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not could they do these things, but have the relations of the parties—the trust relations, if indeed such existed—been abused to the serious injury of the Southwestern Company."

There can be no doubt that where a corporation deals with a controlling stockholder *there is an opportunity* for fraud upon the minority stockholder. It is frequently said that courts will scrutinize such transactions to ascertain whether they are fair. Such scrutiny is invited here.

The user contract negotiated by the Wheeling management is so favorable to Wheeling that appellant is denouncing it as discriminatory against other carriers using the station. The same management has negotiated a sale of the property proposed to be abandoned to Building for the account of Terminals for $1,600,000.00, approximately twice the value put upon it by disinterested appraisers (*supra* p. 102). As of 1918 the property was tentatively valued by the Interstate Commerce Commission independently of this proceeding in the sum of $380,618.75. If the Court, looking for evidence of unfairness to Wheeling stockholders, goes beyond the contracts themselves to the personnel of Wheeling's directory it will not find any employes or agents of the controlling stockholders put upon the board when they acquired control. On the contrary, it will appear from the minutes of the stockholders' meetings in 1927 and 1928 (Exs. 88 and 91) that the votes of the controlling stockholders were cast for the re-election of twelve directors, some of whom had served continuously from the organization of the corporation in 1916. We submit that the reasonable inference is that these directors were re-elected by the controlling stockholders, not because they would be facile in-

struments for looting the company, but because they had demonstrated their ability over a period of years to manage with notable success a corporation in which the majority stockholders had just invested a great deal of money.

If Central, Nickel Plate and B. & O. voted to re-elect the existing management because they were confident that it would adequately protect the Wheeling's interest, that confidence was amply justified, we submit, by the ensuing transactions between Wheeling and Terminals.

Appellant argues (pp. 118 to 124 of its brief) that although Wheeling consistently refused to go into Terminals' station from the time when the matter was first discussed in 1918 until the acquisition of control of its stock by New York Central, Nickel Plate and B. & O., it finally entered into the user contract after that acquisition of control and because its management was dominated by stockholders of Terminals. Again we wish to point out that B. & O. has at no time had any interest in Terminals and hence had no reason to exert its influence in that direction. We wish to point out further that appellant's analysis of the testimony of Mr. Duncan in support of its contention is faulty. On page 279 of the printed record appears Mr. Duncan's testimony with reference to the conversation he had with Mr. O. P. Van Sweringen in October, 1924, more than two years prior to the acquisition of control. On the following page, Mr. Duncan states that he dictated a memorandum at the meeting of the subject matter of discussion. On page 281, referring to the same memorandum, Mr. Duncan testified:

> "The memorandum also stated that Wheeling would go into the station with so many cars per annum, with so much per car, something like that, and all those were left blank because we could not agree upon that. I was taking the position that if we went into the station it would have to be for some sum not to

exceed what the Wheeling might be paying for its own station at that time."

At page 276 of the printed record, Mr. Duncan testified that he had originally objected to Wheeling's entering the union terminal on the ground that the proposal assumed "that Wheeling could afford to live in a palace and that its revenue put that out of the picture."

In 1924, before anyone interested in Terminals had acquired any control of Wheeling, Mr. Duncan indicated that Wheeling would go into the station if it could do so without increasing its expenditure for station purposes in Cleveland. When Wheeling finally agreed, in 1928, to the user contract, it was upon the identical terms indicated by Mr. Duncan in 1918 and expressly stated by him to Mr. Van Sweringen in 1924, to-wit, it went in at a rental not exceeding the cost of maintaining its own station. How can anyone detect in this steady maintenance by Wheeling of the position that it would not pay for accommodations in the Terminals more than it would pay elsewhere, any evidence of domination and control of the Wheeling board and management after the acquisition of the stock interest by the three railroads?

The user contract was finally negotiated, not because of any change in the attitude of the Wheeling management, but rather because Terminals had reached the point where at last it had to accede to conditions that Wheeling had been insisting on from the beginning. The charge of The Pittsburgh & West Virginia Railway Company that the Wheeling management was swayed in this matter by a hair's breadth, by the acquisition of Wheeling stock by two of Terminals' proprietors, is not only contrary to the fact but comes with extraordinarily ill grace from a company which, by reason of its own large holding of Wheeling stock, has profited largely from its management's steadfast

and finally triumphant insistence that it would not pay a luxury price for Cleveland passenger station facilities.

Furthermore, appellant's attempt (pp. 121 and 122 of its brief) to impeach good faith of the Wheeling management in consenting to the Eagle Avenue Ramp Ordinance and to the lowering of its own tracks thereunder, is disingenuous. Mr. Duncan testified (Record p. 284) that Wheeling finally consented after the City Solicitor had told him that he had received instructions to take action to compel the lowering of Wheeling's tracks. In other words, the question was going out of the realm of argument into that of litigation, with Wheeling resisting what the entire community regarded as a great public improvement. It was this *litigation* that the Wheeling management regarded as threatening its relations with the public and its shippers and which induced it to acquiesce in the ordinance.

12. THE COMMISSION WAS WITHOUT JURISDICTION TO PASS UPON JUDICIAL QUESTIONS.

At Point XII of its brief appellant argues that the District Court and the Interstate Commerce Commission erred in finding and holding that the Interstate Commerce Commission was without jurisdiction to apply the statutes of the State of Ohio and the general principles of law referred to in preceding points of its brief. This contention, however, is opposed to the entire current of authority; and it is significant that in its development appellant cites no decisions either of the courts or of the Commission.

It is elementary that the Interstate Commerce Commission may exercise only those powers delegated to it by Congress, and that the source of its authority and the scope of its jurisdiction in any proceeding must be found in the Federal statutes. This well established principle has often been recognized in the decisions of the Commission:

Streever Lumber Company v. Chicago, Milwaukee & St. Paul Railway Company, et al., 34 I. C. C., 1, 2;
Maritime Association of Boston Chamber of Commerce, et al. v. Ann Arbor Railroad Company, et al., 95 I. C. C., 539, 565;
Pfister & Vogel Leather Company v. Erie Railroad Company, et al., 112 I. C. C., 659, 660.

The Commission's jurisdiction to entertain these proceedings and to grant or deny the certificates applied for is conferred by paragraphs (18) to (20), inclusive, of section 1 of Title 49, U. S. C., which read as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over, or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in

which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

This Court has expressly declared that the action of the Interstate Commerce Commission in granting or refus-

ing a certificate of public convenience and necessity pursuant to the above quoted paragraphs is an exercise of an administrative judgment. Thus the Court says at page 273 of its opinion in the case of *Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266:

> "The function of the court upon an application for an injunction under paragraph 20 is a very different one from that exercised by the Commission when, having taken jurisdiction under paragraphs 19 and 20, it grants or refuses a certificate. The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. Compare *Great Northern Ry. Co. v. Merchants Elevator Co.,* 259 U. S. 285, 295."

It seems clear that in administering the provisions of paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act, the Commission may not go beyond the scope of the administrative powers delegated to it by these paragraphs and exercise powers of a judicial nature. This principle is supported by the following authorities:

The case of *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. United States,* 275 U. S. 404, arose upon an appeal from a decree of the District Court dismissing a bill to set aside an order of the Interstate Commerce Commission requiring the Railway Company to construct a switch connection with a private siding or spur of a coal company (an Illinois mining corporation). In passing upon and rejecting one of the contentions of the appellant, this Court says at pages 413 and 414 of its opinion:

> "Seventh. It is contended that the Coal Company is not a shipper on the Big Four, within the meaning of paragraph 9, because the railroad can be com-

pelled to build the connection only with a 'private side track which may be constructed to connect with its railroad' and the track of the Coal Company, if a private track, could not be legally constructed. The argument is that, under the law of Illinois, only a public track may cross a highway; that an Illinois mining corporation has no power to build a public track; that since the Coal Company is an Illinois corporation the construction of the track was *ultra vires;* that hence, whether the track be public or private, it is an illegal structure; and that consequently it is not a track 'which may be constructed' within the meaning of paragraph 9. Congress obviously did not impose upon the Interstate Commerce Commission the duty of determining, before issuing an order, whether or not a private track actually in existence had been constructed by the shipper *ultra vires.* Whether in so acting, the shipper transgressed powers conferred upon it by the State is a question which cannot be raised in this suit. If the State concludes to question the legality of the shipper's acts, it must do so in a direct proceeding instituted by it for that purpose, *Kerfoot v. Farmers & Merchants Bank,* 218 U. S. 281, 287."

The case of *Thunder Bay Limestone Co. v. Detroit & M. Ry. Co.,* 294 Fed. 958, was a suit to enjoin the construction of an extension of the defendant's line of railroad across the plaintiff's property at a location slightly different from the point of crossing indicated on the maps filed with the Interstate Commerce Commission in a proceeding wherein the Commission had granted to the defendant a certificate of convenience and necessity. In dismissing the bill, the court says, at pages 962 and 963 of its opinion:

"The Commission is interested in the public necessity and convenience in connection with the construction of the road in the territory to be served. It is interested in the public; it is not interested in the minutiae of the particular lands to be acquired for the right of way nor the rights of the individual owners

thereof. These are all matters for consideration in the condemnation proceedings pending in the probate court. So long as the public to be accommodated will actually be served just as well by the line, it is immaterial to the Interstate Commerce Commission that the location of the line is slightly varied. To hold otherwise would require the approval of each contemplated change in the route, however small. Among the Interstate Commerce Commission cases cited will be found some in which the certificate of public convenience and necessity was issued, where there had been no definite road established, except by naming the main stops and the ultimate termini. There are other cases among those cited in which the Interstate Commerce Commission holds that the relocation of lines involving a variation of as much as a mile, but serving the same general public, does not require a certificate of authorization. These are matters of administration and particularly within the purview of the Commission. The Commission nominates the general route, and may well name the general stops, since these things concern the public to be served by the road to be constructed, but whether, as in the case at bar, the line of road passes through the northerly portion of a piece of wild, unoccupied land, or passes 500 feet farther south on the same 40 acres of land, is a matter with which the Commission ought not to be burdened. In the case at bar it will be noted that the application to the Interstate Commerce Commission for the certificate of public convenience and necessity did not detail the particular lands to be crossed, nor the particular government subdivisions nor the particular line of the route, but simply described the route as extending in a northeasterly and northerly direction from Alpena to Rockport, and it was that description of the route to be built that the Commission approved and authorized to be constructed. The proposed line crossing plaintiff's land, the construction and condemnation of which is sought to be enjoined by plaintiff, is well within the certificate of public convenience and necessity issued to the defendant by the Interstate Commerce Commission on July 2, 1923.

"In the construction of a railroad between two given points, it is inevitable that some landowner may be more or less damaged and inconvenienced. No railroad could be constructed which would pass over every owner's land to his entire satisfaction; but adequate provision is made in the condemnation laws to recompense the owner for such damages. The Michigan laws are very clear that in all cases the railroad must pay 'just compensation and damages.'

"The necessity for a railroad between Alpena and Rockport for the welfare of the public generally is a question wisely vested in the sound discretion of the Interstate Commerce Commission. The question as to compensation and damages to the landowner over whose land it passes is one to be determined by commissioners or a jury who are privileged to view the premises and hear the evidence."

In the case of *The Wheeling and Lake Erie Railway Company vs. Pittsburgh & West Virginia Railway Company*, 33 Fed. (2nd) 390, certiorari denied, 280 U. S. ...., 50 Sup. Ct. 40, the Circuit Court of Appeals for the Sixth Circuit vacated a preliminary injunction secured by the appellant herein against Wheeling and Terminals to prevent Wheeling from executing a contract with Terminals giving to Terminals temporary right to perform certain work of excavation and construction on Wheeling's lands northerly of Eagle Avenue. As appears from the opinion, appellant urged the application of Sections 8806-8809 of the General Code of Ohio to the proposed temporary contract between Wheeling and Terminals. The Circuit Court of Appeals rejected this contention in the following language appearing at page 393 of the opinion:

"The same reasons that impel the foregoing holding lead to a like conclusion as to the inapplicability of Sections 504-2 and 504-3 of the General Code of Ohio, —indeed, the decision of the Supreme Court of Ohio, in *Pittsburgh & W. Va. Ry. Co. v. Public Utilities Com-*

mission of Ohio, supra, is conclusive of that question. Neither are sections 8806-8809, inclusive, of the General Code of Ohio applicable. It is doubtful that those provisions apply to a terminal company at all, but if they do they do not apply to such a contract as is here involved. Whether they apply to the earlier agreement is a question with which we are not concerned. If they do, the most that can be claimed is that that agreement cannot be made effective until the companies have secured the approval thereto of their stockholders as required by these statutes. There will be ample time for that, if and after the Commission determines that the contract (of December 7, 1928; Exhibit 15 herein) may be made."

More important still, this quotation indicates that questions relating to stockholders' approval are not to be passed upon by the Commission, but on the contrary holds that such questions are for the courts after the Commission has acted with reference to the user contract.

The above quotation also throws light upon the statement in a later paragraph of the opinion:

> "If the (user) contract should be approved by the Commission, there will be an administrative determination by an expert body, entitled to the greatest weight, that the arrangement is just and reasonable. If it should not be approved as drawn, the Commission has the power either to reject it entirely or to approve it upon terms that the Commission deems fair to all parties interested, including the stockholders. The plaintiff has the right to present its views of these matters to the Commission, and, if it is dissatisfied with the decision of that tribunal, it may go further and present them to the courts. *Cleveland, C., C. & St. L. R. Co. v. Jackson,* 22 F. (2d) 509 (6 C. C. A.)."

In other words, the Circuit Court of Appeals recognizes that in an administrative proceeding involving a proposed user contract, the fairness of its terms and conditions, both

as respects the applicant and its stockholders, are matters for decision by the Commission, but in the same opinion it holds specifically that questions relating to the rights of stockholders to demand their approval of the contract are questions to be determined—presumably by the courts—"after the Commission determines that the contract may be made." The clear purport of this opinion is that administrative questions are for the Commission, but that judicial questions—including questions relating to the necessity of stockholders' approval—are for the courts.

It is submitted that this opinion, rendered in a case between appellant herein, on the one hand, and Wheeling, its directors, and Terminals, on the other hand, and considered by this Court upon petition for certiorari, should be treated as the law of the instant case and as justifying the action of the Commission in refusing jurisdiction of the judicial questions urged upon it by appellant.

The general principle announced in these four cases has often been recognized in the decisions of the Commission:

International Coal Products Corporation v. Director General, et al., 81 I. C. C., 435;

Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, 104 I. C. C., 203, 226;

Briggs & Turivas v. Director General, 112 I. C. C. 313, 314;

Kansas City Structural Steel Company v. Atchison, Topeka & Santa Fe Railway Company, 102 I. C. C. 113, 114;

H. L. Buss Company v. New York Central Railroad Company, 45 I. C. C. 161;

National Industrial Traffic League v. Aberdeen & Rockfish Railroad Company, et al., 61 I. C. C. 120;

Rosser & Fitch, et al. v. Atlantic Coast Line Railroad Company, et al., 91 I. C. C. 611;
Department of Highways, State of Nevada v. Baltimore & Ohio Railroad Company, et al., 132 I. C. C. 727, 730.

13. THE HOLDINGS OF THE DISTRICT COURT COMPLAINED OF IN POINT XIII OF ITS BRIEF WERE CORRECT IN POINT OF LAW AND AT ANY RATE NOT PREJUDICIAL TO APPELLANT.

Appellant argues (Appellant's brief pp. 128-131) that the District Court erred in holding that it could not consider the contentions of appellant that the contracts in question were invalid by reason of the "adverse interest" of Wheeling's directors and by reason of the failure of Wheeling to comply with Sections 8747, 8772, 8806-8809 of the General Code of Ohio.

This is not a complete statement of the Court's rulings with respect to those matters. The Court, in its opinion, considered the contention that the contracts were invalid because of the alleged control by Terminals' stockholders of Wheeling directors and found that such alleged control did not avoid the contracts because the contracts were in fact fair to Wheeling. Our argument in support of the correctness of the Court's conclusion in this respect will be found on pages 111 to 117 of this brief.

Next (Record p. 495), the Court considered plaintiff's contention with reference to our non-compliance with the Ohio statutes and found them to be inapplicable. Our argument in support of this conclusion will be found *supra* pp. 74-92. The opinion then proceeds:

> "In addition to this answer to complainant's contention it may also be said that these last two matters discussed constituted alleged private grievances as between complainant and but one of defendants

(Wheeling) in which the other defendants are but indirectly and collaterally interested, if at all."

In effect the Court below held:

1. That the two contentions of appellant in question were bad in point of law.

2. That in any event, they had no bearing upon the Commission's certificates of public convenience and necessity but related only to private grievances of Wheeling stockholders. (See pp. 117-126, *supra.*)

3. That so much of plaintiff's bill as sought to enjoin Wheeling's corporate action for alleged violation of the private rights of its stockholders was misjoined with its principal cause of action for the vacation of the Commission's certificates.

The ultimate conclusion of the Court below that the question of whether the private rights of stockholders would be infringed by Wheeling's exercise of its option and of its rights under the user contract, seems to be entirely supported by the decision of this Court in *C. C. C. & St. L. Ry. Co. v. U. S.*, 275 U. S. 404, 413-4, cited by the Court.

The *Chicago Junction* case, 264 U. S. 258, relied upon by appellant in this connection, is not in point. There, the question was not as to the right to join a separate cause of action in aid of private interests. In that case, after the certificate was issued by the Commission, the applicant proceeded to acquire the stock of another carrier. The plaintiff sought not only to have the Commission's order authorizing the purchase declared void, but also to have the purchase of the stock and lease set aside, in order that the *status quo ante* might be restored. The latter prayer was obviously ancillary to the first and necessary if the vacation of the Commission's order were to be made effective. This Court approved the joinder, the opinion by Mr. Justice Brandeis saying:

"To prohibit the joinder would, in large measure, defeat the very purpose of the bill and would clearly prevent that expedition in affording relief which it was the purpose of Congress to ensure."

Certainly there is nothing in the *Chicago Junction* case that would indicate that a stockholder of New York Central could have maintained a bill to vacate the Commission's order and also, independently of any defect in the order, to have enjoined the New York Central from purchasing the stock of the other carrier because his rights as a stockholder of New York Central had been invaded.

14. APPELLANT WAS NOT PREJUDICED BY THE COURT'S FAILURE TO RECEIVE ANY TESTIMONY OFFERED BY APPELLANT.

The record shows (pp. 484, 485) that at the hearing of the motion for preliminary injunction the parties consented that the case might be taken by the Court as on final hearing. It further appeared that complainant's counsel "announced their intention to rely upon the record before the Commission and upon further evidence of witnesses to be taken in open court." Now, obviously, the ruling of the Commission could not be reviewed upon evidence not before it. Plaintiff did offer the record of the proceedings and testimony before the Commission and it was received in evidence and considered by the Court (Record p. 485).

Plaintiff's bill, insofar as it related to other matters than the validity of the Commission's certificates having been dismissed for a misjoinder, obviously there was never any occasion for the taking of testimony with respect to such causes of action. An examination of the record (pp. 484, 485) will show that counsel made no statement as to the nature of the "further evidence of witnesses to be taken in open court," so that upon this record it is im-

sible for this Court to say whether such evidence would e been material upon the causes of action which the ırt below thought had been misjoined.

From plaintiff's brief (p. 131 *et seq.*), it appears that testimony to which counsel referred on the hearing was further support of appellant's claim that Wheeling not have the benefit and judgment of a disinterested ectorate."

Certainly such evidence, if admissible at all, must have n in support of some allegation of plaintiff's bill of plaint.

The pertinent averments are found in paragraph (j) Section XLVII of the bill of complaint. This charges substance that the exercise by Wheeling of the option tract and its performance of the user contract are illegal ause the directors of Wheeling who voted to authorize contract were not competent, "due to the fact that they l and hold their offices by virtue of the votes" of Cen- and Nickel Plate.

In view of the fact that the record shows, and we con- e, that the votes of these carriers were cast for twelve Wheeling's fifteen directors, it is impossible to see how admission of any further evidence could have helped ellant's position. The evidence offered was either di- ed to some defect of the directors, not disclosed by ap- ant's bill, and hence irrelevant, or else it was in sup- t of an allegation that all the defendants admit.

We have argued elsewhere (pp. 111-117, *supra*) that contracts are not subject to attack because they were norized by directors elected by stockholders with an in- st adverse to Wheeling, unless it appears that such kholders succeeded thereby in getting contracts from eeling, unfair to it, and further that the evidence here blishes beyond dispute, that the interests of Wheeling its stockholders have been amply protected.

15. APPELLANT'S ARGUMENT AS TO PUBLIC INTEREST IS WITHOUT MERIT.

In Point XV of its brief appellant argues the question of public interest. It is submitted that this entire discussion contains not one material argument against the finding of the Commission that the public convenience and necessity would be served by permitting Wheeling to acquire passenger station facilities and service in the union depot of Terminals and to abandon its right of way northerly of Eagle Avenue. Indeed, it appears that appellant is foreclosed from making such an argument for the reason that there is no allegation to that effect in its amended bill. See discussion of this point, *supra*, page 18.

Appellant's argument under Point XV reduces itself to a series of suggested solutions of the problem confronting Wheeling different from that proposed by Wheeling and approved by the Commission. Certain of these suggestions seem too fanciful to merit any serious attention, such as the proposals to remove the Eagle Avenue Ramp, which cost $2,000,000 to construct, to substitute another in its place, and to compel Terminals to depress its tracks below the level of Wheeling's tracks and to underpin the buildings in the terminal area, involving a probable cost of $10,000,000 and a delay of two years in the opening of the union depot. Instead of Wheeling's passengers being brought directly into the union depot on Wheeling's trains, appellant proposes that they be unloaded at a new station to be constructed by Wheeling upon the property proposed to be abandoned and permitted to walk through a tunnel from such station to the union depot where, it is said, they would secure the same advantages as if brought directly into that depot.

A sufficient answer to all of these proposals and suggestions is that they are not within the scope of the applications filed in these proceedings; that they were not be-

fore the Commission in these proceedings; that the Commission made no finding with respect to such proposals, and that they are therefore not before this Court for consideration. Even if they were it is elementary that this Court will not substitute its judgment for the judgment of the Commission upon such administrative matters. See *United States, et al. v. New River Company, et al.*, 265 U. S. 533, 542.

CONCLUSION.

For the reasons set forth in the foregoing argument it is submitted that the decree of the District Court in these proceedings should be affirmed.

Respectfully submitted,

W. C. Boyle,
Clan Crawford,
Charles F. Close,
Andrew P. Martin,

Solicitors for The Wheeling and Lake Erie Railway Company, Appellee.

Squire, Sanders & Dempsey,

Of Counsel.

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CHARLES ELMORE C

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 680.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

BRIEF ON BEHALF OF THE CLEVELAND UNION TERMINALS COMPANY, THE CLEVELAND TERMINALS BUILDING COMPANY.

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H. H. MCKEEHAN, and
L. C. WYKOFF,
Solicitors.

CHARLES W. STAGE,
BOYD, CANNNON, BROOKS & WICKHAM,
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GEORGE WILLIAM COTTRELL,
Terminal Tower, Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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BRIEF ON BEHALF OF THE CLEVELAND UNION TERMINALS COMPANY, THE CLEVELAND TERMINALS BUILDING COMPANY.

I. STATEMENT OF FACTS.

During the war period, in 1918, Mr. A. H. Smith, then President of The New York Central Railroad Company and Regional Director of Railroads under Federal control, appointed a committee, representing each of the railroads entering Cleveland, to investigate the passenger depot situation in Cleveland. The work of this committee resulted in a recommendation that a union passenger station be constructed southwest of Cleveland's Public Square, and this union station is now very near completion and is, indeed, now in use for certain passenger traffic. (R. p. 296.) In furtherance of this recommendation Messrs. O. P. and M. J. Van Sweringen thereupon caused The Cleveland Union Terminals Company to be incorporated and organized under the laws of the State of Ohio as "a union depot company." (Exhibit No. 68.)

Early in 1921, the Central, the Nickel Plate and the Big Four duly filed their applications with the Interstate Commerce Commission for a certificate of public convenience and necessity for the construction and operation, through the medium of The Cleveland Union Terminals Company, of the Cleveland Union Depot, with all necessary terminal and connecting tracks and approaches thereto. Attached to, and made a part of, these applications, were certain proposed contracts, plans and maps. The contracts, among other things, provided for the location and financing of the union depot and the plan showed the location and the elevations, as well as the character and the extent of the entire development. It was upon these aplications and in accordance with these contracts and plans that the Commission issued its certificate of public convenience and necessity. (Exhibit No. 55.) From this exhibit we quote the following:

> "*It is hereby certified* that the present and future convenience and necessity require and will require the construction and operation of a terminal station and the line of railroad constituting the approaches thereto, in the city of Cleveland, Ohio, as described in the applications and the report aforesaid. * * *."
>
> "*It is further ordered* that said New York Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and New York, Chicago and St. Louis Railroad Company be and they are hereby authorized to construct and operate said line of railroad and terminal station, by and through control of, and contract with, The Cleveland Union Terminals Company, in the manner described in said applications, * * *."

This certificate and order not only provided for, but required, construction of the union depot in accordance with the contract and plans approved and submitted, and these not only provided for, but absolutely required, the

use by the Terminals Company of the Wheeling's passenger station site, by the construction and maintenance by Terminals of nine tracks through, under and across its property at elevation 52 above Cleveland city datum.

From the bank of the Cuyahoga River in the lowland, this Wheeling property extended by a steep elevation to the westerly side of Ontario Street, so that it constitutes the "throat" and immediate entrance to the union station from the East, and there was, topographically, no possibility presented for going around it. (R. pp. 230, *et seq.*) This property is absolutely essential to the operation of the union depot.

Because of this fact, the Wheeling filed its intervening petition in the above proceeding, opposing such applications. It appeared and took a somewhat active part in the proceedings up to a certain point, when it withdrew its opposition under a stipulation which was entered of record. (Exhibit No. 70.) That stipulation in substance provided that, if the Commission should grant the application, it should be without prejudice to the rights of the Wheeling under the laws of the State of Ohio in so far as its freight and passenger facilities in Cleveland were concerned, and, further, that, if the Terminals Company or any affiliated therewith should make application to cross the property of the Wheeling at, above or below grade, the entire cost and damages of such crossing should be borne by the Terminals Company or its associates.

The final certificate issued by the Commission did not mention the Wheeling with definiteness and, by reason thereof, another stipulation was made on January 26, 1922, between the above mentioned proprietary railroads and the Terminals Company on the one hand, and the Wheeling upon the other. (Exhibit No. 71.) This stipulation was made to avoid the necessity of asking the Commission to correct its certificate and order. That stipulation, in a

word, provided that the final order and report of the Commission of December 6, 1921, should be without prejudice to Wheeling's rights and that the rights of the parties should be as set forth in the stipulation first above mentioned.

It is clearly apparent that Wheeling was seeking to have its rights under the laws of the State of Ohio recognized and protected. These rights entitled it to "full compensation" for any easements or property which it would have to surrender to the Terminals Company because of the proposed improvement, for the Terminals Company might have availed itself of the provisions of the General Code of Ohio authorizing it to acquire the right to go through Wheeling's property at elevation 52 by applying to the appropriate court to fix the terms and conditions thereof and to pay compensation fixed by a jury. (Ohio General Code, Sections 8834 to 8842 inc.)

It was in this situation and under these circumstances that Terminals' officers and Wheeling's officers entered into negotiations for the use of Wheeling's property in the manner provided for and required by the Commission's certificate and order. (R. Duncan pp. 277, 278.) The Terminals Company, however, had many obstacles to overcome in the early stages of this vast enterprise, and it was not until the year 1924 that the most serious of these were cleared away. In 1924 these respective officers continued the negotiations with redoubled zeal. (R. p. 279.)

It should be here noted that the city ordinance, under which the Terminals Company was permitted to use large areas of public streets and grounds in the construction of its depot and approaches, required that the Terminals Company should construct, for the city, a new highway for vehicular traffic from the lowlands or flats up to Ontario Street. This was but reasonable, because the ordinance provided for the vacation of many old streets which had

theretofore accommodated this traffic. Beginning with 1926, the city undertook to specify the location and kind of highway which it would require the Terminals Company to construct. The best, if not indeed the only practical, route was by way of Eagle Avenue, and an elevated highway in this avenue of necessity interfered more or less with the use by Wheeling of its underlying property. Some two years were consumed in negotiations on this subject by officials of the city, the Wheeling and the Terminals Company. In 1927 the city determined to resort to legal proceedings to compel the Wheeling to submit to the city's plans. Finally, there was an agreement of the city, the Wheeling and the Terminals Company which agreement took the form of an ordinance which required the Terminals Company to construct longitudinally in Eagle Avenue what is now known herein as the Eagle Avenue ramp which is now fully completed and in use. (R. pp. 282 to 285.)

All this had a material and decisive effect upon the negotiations between Wheeling and the Terminals Company for the use by the latter of the former's land. Theretofore these negotiations had proceeded upon the theory that the Terminals Company could use the Wheeling land at elevation 52 in accordance with the certificate and order of the Commission, while, at the same time, Wheeling could also use its land at its own elevation. The construction of the ramp made this impossible. The situation which then confronted the parties was this: Shall the Wheeling abandon its depot and seek one elsewhere or shall the Terminals Company abandon its union depot project in which it had already spent more than $25,000,000.00 and, in the successful carrying forward of which, the city of Cleveland and the public had a very vital interest. Thereupon, the negotiations between Wheeling and the Terminals Company took on the two-fold character of providing by the Terminals Company depot facilities for Wheeling in

the new passenger station and of selling Wheeling's property so that it would be of use to the Terminals Company. (R. p. 285.) These negotiations began in October, 1927, and culminated in the contracts herein involved:

(a) Between the Terminals Company and Wheeling by which the former agrees to furnish the latter space, facilities and service within the new union depot. (Exhibit No. 15.)

(b) Between Wheeling, Big Four and Erie by which the latter two furnish temporary track and passenger depot facilities for the former until the completion of the union depot. (Exhibit No. 16.)

(c) Between Wheeling and Terminals Building Company by which the former is given the option to compel the latter to buy its passenger station site for the sum of $1,600,000.00. (Exhibit No. 11.)

The explanation for the last mentioned contract lies in the fact that, under the contracts filed with, and approved by, the Commission in 1921, providing for the financing of the union depot project, the Building Company obligated itself to pay the cost of acquiring the entire East approach to the union depot, which approach is one and one quarter miles in length and of an approximate width throughout of 100 feet, and it embraced the Wheeling property. Under the contracts referred to, if Wheeling exercised its option, the Building Company was obligated to pay the purchase price and it would then convey to the Terminals Company a perpetual easement and right of way for its uses and purposes. This is in strict compliance with the contracts for financing, which were approved by the Commission.

An examination of these contracts clearly discloses that Wheeling's officers carefully safeguarded Wheeling's interests. Wheeling is essentially a freight carrying road, and its passenger traffic is a very small part of its total

business. The annual charge of $20,000.00 for use of union station facilities for at least the first five years was as much as it could afford to pay. The price of $1,600,000.00 which it placed upon its land is the highest figure which any of the real estate experts employed by it would fix as its value. Indeed, but one fixed so high a value and Mr. Duncan tenaciously insisted that such should be the purchase price. Wheeling's own real estate department and its executive officers advised with Mr. Duncan as to the value of the property.

Some idea of the careful consideration which Wheeling's Board gave to this matter may be gathered from the minutes of the Board meeting of July 20, 1928, at which Messrs. Loree and Ecker, Board members, caused to be recorded a very clear statement of their reasons for voting as they did:

> "The position taken by Mr. Ecker and Mr. Loree upon the recommendations of the Executive Committee is:
>
> (1) That the price recommended for the passenger terminal property of the Wheeling and Lake Erie Railway Company north of Eagle Avenue, namely, $1,600,000, is the top price justified as value by any of the appraisers reporting thereon.
>
> (2) That it is not believed that the property could be disposed of at this price to any other purchasers.
>
> (3) That there is no basis for punitive damages, since better facilities are offered by the Cleveland Terminals Company at the present cost to the Wheeling, running for 99 years and optional as to withdrawal for 50 years, with proportionate rental increases for increased service.
>
> (4) The Wheeling is a public service corporation owing a duty to the community and this is the primary moving consideration to the sale, subject only to the full protection of its interests." (R. p. 249, Ex. 46.)

Mr. Loree has been nationally known as a leading railroad executive for more than a quarter of a century, while Mr. Ecker is the president of the Metropolitan Life Insurance Company.

It was the position of Wheeling and of the Terminals Company before the Commission in the proceedings herein involved, that the Commission was without jurisdiction over the price at which Wheeling might sell its land after its abandonment for railway purposes should be authorized by the Commission, while the contrary claim was asserted by the appellant. The fullest opportunity was afforded all interested parties to offer evidence of experts as to this value and all parties availed themselves thereof. Their testimony appears in the record. (R. pp. 324 to 354 and R. pp. 510 to 583.) Messrs. Platten and Saum, testifying for appellant, placed the value at $7,000,000.00 plus. The cross examination of Platten and the direct examination of Saum will disclose to anyone interested in reading the same, their complete lack of qualification to helpfully testify.

A like examination of the testimony of those called—six in all—by Wheeling and by the Terminals Company will disclose the complete fitness of each to testify with intelligence. The testimony of four of these as to the value of the property which Wheeling proposed to sell to the Building Company for $1,600,000.00 is as follows:

John D. Fackler	$814,000.00
Stanley L. McMichael	828,843.73
Joseph Laronge	700,023.00
Raymond T. Cragin	877,473.00

The so-called adjusted area which included parts of some streets which it was claimed by Wheeling would go with the property to be sold after the streets were vacated, was appraised as follows:

Alexander S. Taylor	$1,600,000.00
A. A. McCaslin	1,418,598.00
Raymond T. Cragin	1,575,000.00

In the course of its duty of fixing values of railroad properties, the Commission's appraisal of that portion of Wheeling's property here involved is $380,600.00.

The Wheeling & Lake Erie Railway Company was incorporated in 1916. In the Fall of 1926 the Central, the B. & O. and the Nickel Plate purchased each an equal number of shares of its capital stock. At the annual meeting of its stockholders in May, 1927, this stock was voted in the election of directors. For some years previous, doubt had existed as to whether all directors should be elected for a yearly period or whether one-third should be elected each year. To set that doubt at rest it was decided, at the meeting last mentioned, to elect five directors to serve for three years, five for two years and five for one year. The result of that election was as follows: Directors for three years, Warren Bicknell, Bertram Cutler, J. A. House, L. F. Loree and Frank E. Taplin. Directors for two years: George A. Coulton, Harris Creech, T. S. Grasselli, E. A. Petrequin, Charles F. Taplin. Directors for one year: W. M. Duncan, George Durham, Frederick H. Ecker, George T. Fillius and G. A. Tomlinson.

At the annual meeting in May, 1928, directors to succeed the last mentioned group were elected to serve for three years as follows: W. M. Duncan, George Durham, Frederick H. Ecker, C. K. Reynolds and G. A. Tomlinson.

Of the fifteen elected at the May, 1927, meeting twelve had served on the 1926 Board and in years prior to that time, many of them having been directors continuously since the organization of the company in 1916. These twelve so elected were: Bicknell, Cutler, House, Loree, Coulton, Creech, Grasselli, Petrequin, Duncan, Durham,

Ecker and Tomlinson. The remaining three elected at the 1927 meeting and who came upon the Board for the first time were: Frank E. and Charles F. Taplin and George T. Fillius. These three were then, ever since have been and are now identified with, and representative of, the appellant. In 1927 the place of Mr. Fillius was filled by the election of C. K. Reynolds who likewise is representative of the appellant.

The first important activity of the Board elected in May, 1927, was its authorization of Wheeling's officers to accept the Cleveland ordinance of 1927, by virtue of which the Eagle Avenue ramp was constructed.

The land which Wheeling proposed to sell to the Building Company has been used by Wheeling for its passenger station and it has and could have no other use. Its passenger depot was built in 1908 under a building permit for one year only and, in later years, and particularly in 1928, the city refused a permit for its repair and improvement. It was in such dangerous condition that the Commission, in January, 1929, issued an emergency order authorizing its abandonment and authorizing Wheeling to make temporary use of the Erie passenger depot, and, shortly thereafter, Wheeling's president, because of its dangerous condition, ordered it to be torn down. Since that time, Wheeling's passenger station site has been without a structure or improvement save only a railroad track. The new Union Depot is contiguous to this Wheeling land, and the new Union Deopt is about 400 feet northerly from the old Wheeling passenger station.

If Wheeling be not permitted to avail itself of the new facilities in the Union Depot and be not permitted to make temporary use of the Erie station, it will have no passenger depot whatever. No contention is made that the facilities offered in the new Union Depot are not ample and superior.

At the time of the hearing before the Commission, the Terminals Company had spent more than $60,000,000.00 in this enterprise. Contracts had been let at that time for completing the entire work, and the total cost was estimated at $90,000,000.00. The Commission has granted these applications. The District Court composed of the requisite three Judges has refused to interfere with that order. If the certificate and order issued are to be annulled, the loss to the Terminals Company, great as it is, does not measure the calamity involved. The Wheeling and Terminals Company cannot both use Wheeling's land. There is no dispute as to that.

Many legal questions arise but certain of these more appropriately belong, for purposes of argument, to Wheeling's counsel, with whom we leave them.

II. AS TO THE EQUITIES AND THE PUBLIC CONVENIENCE.

Since the destruction of Wheeling's passenger station and the deflection of its trains to the Erie station over the tracks of the Big Four and the Erie, Wheeling's passenger station site, embracing the land involved in this controversy, has been put to no appreciable railroad use and has yielded no appreciable income. Wheeling must either build a new passenger station for itself, or go elsewhere for permanent passenger station facilities. Under the evidence of its General Manager, Mr. Durham (R. p. 223 *et seq.*) Wheeling could not afford a new passenger station because of its comparatively small passenger business. On the other hand, as testified by Mr. Durham, it was losing passenger business and the consequent income. Its advisers, then its officers, then its Executive Committee and finally its Board of Directors decided to abandon its station site with the consent of the Interstate Commerce

Commission, and enter the new Union Passenger Station. The appellant makes no contention as to a lack of facilities in this new station—its complaint being that Wheeling gets more than it pays for.

More than nine years ago this new Union Station was approved by the Commission on exact plans and maps which required the use of Wheeling's lands—not necessarily to the exclusion of Wheeling—but at elevation 52 which is below the grade of Wheeling's tracks. That it finally had to be to the exclusion of Wheeling was due to the building of the Eagle Avenue ramp and this was due to conditions over which neither Wheeling nor the Terminals Company had any control. Mr. Duncan, Wheeling's president during all the years involved, testifies clearly and forcibly that Wheeling withstood the city's demands as to this Eagle Avenue ramp until Wheeling came to the conclusion that, considering the fact that it must operate its trains in the city of Cleveland, it could no longer withstand the city's demands (R. p. 284). Mr. Hopkins, the City Manager of the city of Cleveland during the years when the Eagle Avenue ramp was under discussion and final construction, likewise clearly testifies (R. pp. 399-400) that the building of the ramp just as it was built was upon his insistence as City Manager and not upon the insistence of the Terminals Company as appellant's brief would have this Court believe.

In its opinion rendered in 1921 on the application for the building of this new Union Station (Exhibit No. 55) the Commission said, among other things:

> "It is conceded by all parties that the existing passenger terminal facilities are antiquated and wholly inadequate."

And:

> "The question presented is whether the plan before us for the construction of the 'Station on the

Square' and its approaches is a proper one from the standpoint of the public interest."

The Commission answered that question in the affirmative, approved the contract, empowered the proprietary lines to own stock in the new corporation in the proportions theretofore agreed upon by them, and, during the succeeding years, authorized and approved expenditures of money and issuances of securities to the extent of the millions of dollars shown in appellant's brief.

The time came when, because of the things hereinbefore mentioned, the Wheeling and the Terminals Company negotiated and entered into the two contracts herein involved, and, thereafter, Wheeling made its application to the Commission for leave to abandon its passenger station site. The governing statute requires that, upon such application, certain notices shall be given to certain parties who shall have "the right to be heard".

It is, of course, permissible for parties in interest to intervene in certain proceedings before the Commission and so, The Pittsburgh & West Virginia Railway Company was given leave to, and did, file its intervening petition and thereafter it, through its counsel, took a very active interest in every part of the proceedings,—indeed, it was, practically speaking, the only opposing party.

It intervened as being a party in interest because:

(a) It was a connecting carrier of Wheeling; and

(b) a stockholder of Wheeling.

Nothing much seems to have been claimed before the Commission or to be now claimed, arising out of the fact that it is a connecting carrier. Indeed, it is somewhat difficult to see how it, as a connecting carrier, could be appreciably damaged by Wheeling's abandonment of its passenger station site and its entry into the new passenger station immediately adjoining.

Its principal contention, therefore, must arise out of the circumstance that it is a stockholder of Wheeling. In other words, its position necessarily must be that Wheeling was proposing to do something forbidden by law and to the financial detriment of Wheeling, and that, since Wheeling's directors and executive officers were alleged to be faithless to their trust, some honest stockholder must protect itself and all other stockholders, and The Pittsburgh & West Virginia Railway Company offered itself as such honest stockholder.

It is not our contention that the Commission abused its discretion in allowing that Railroad Company to intervene, nor do we contend that it has not the right to seek proper redress in court, as it has sought through the institution of this action in the District Court. But we do claim that its protestations as to the purity of its motives are not conclusive upon any court, and we do claim that where the necessary result of a decision in its favor would be to practically destroy a great public enterprise for a great city and all of those members of the public who are to be accommodated by the enterprise, a court of equity has the right to, and should, scrutinize very carefully the motives which impel the action, and that it should refuse relief unless the rights asserted are virile and the law almost compulsory.

Let us scrutinize, somewhat briefly, appellant's conduct as a stockholder of the Wheeling:

Wheeling's President began in 1918 the negotiations which finally culminated in these contracts. The Messrs. Taplin first came upon Wheeling's directory May 25, 1927 (Exhibit 88). They came as representatives of the stockholder, The Pittsburgh & West Virginia Railway Company. They have remained upon the Board continuously to the present time. We submit that the record fairly shows that, in every action taken, they acted more as direct representa-

tives of that railroad company than they did as representatives of the Wheeling.

On July 11, 1928 at a regular monthly meeting of Wheeling's directors, there came up for discussion the report and recommendation of the Executive Committee and of the officers of Wheeling as to this contract for the sale of Wheeling's land (Exhibit No. 45). The Messrs. Taplin were present, and, through the lawyer brother, entered a formal protest, and among other objections advanced was that the price of the land was "neither the fair and reasonable value" nor "the best price obtainable therefor," adding that he would recommend to the stockholders "whose interests I represent" that legal action be taken to prevent the consummation of any such sale. This has always been their position, and is a specific allegation of their bill of complaint herein. In other words, they claimed that the price should be higher—that the dollars to be paid for the land should be more. This attorney director made his position even more clear when, on August 3, 1928, he wrote to Wheeling's Secretary (Page 2 of Exhibit No. 86), among other things that:

> "* * * since this company's property concededly was absolutely necessary to The Cleveland Union Terminals Company for its easterly approach to the new station, there rested upon the directors of this company the obligation to secure for the company the best price obtainable for this property."

He was after what Mr. Justice Lurton referred to as "strategic value" in *United States v. The Chandler-Dunbar Company*, 229 U. S. 53 (79).

That Directors' Meeting was adjourned without action on the matter under discussion until July 20, 1928, when again came the Messrs. Taplin and also Director Reynolds, allied with them. This is the meeting, hereinbefore referred to, at which Messrs. Loree and Ecker caused their

reasons for approving the sale to be set forth. This meeting authorized and directed Wheeling's officers to enter into the contracts under discussion. This action was taken (to quote the language of counsel for appellant in their brief, page 18) "over the protest of the directors elected by appellant."

If the "certificate issues, not primarily to protect the Railroad, but to protect interstate commerce from undue burdens or discrimination" as was said by this Court where the question was an abandonment of a narrow gauge line of railway (*Colorado v. United States*, 271 U. S. 153 (162)); and if the Interstate Commerce Commission has sole power in "the exercise of administrative judgment" (*T. & P. Ry. Co. v. Gulf etc. Ry. Co.*, 270 U. S. 266 (273)); and if in matters of abandonment that Commission has "authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with the public convenience and necessity" (*Colorado v. U. S., supra* (165)); and if a Court cannot "consider the weight of the evidence or the wisdom of the order" (*New England Divisions Case*, 261 U. S. 184 (204)); and if "mere expediency or wisdom" of a given order of the Commission be "not open to judicial review" (*I. C. C. v. C. R. I. & P. Ry.*, 218 U. S. 88 (103)), then how stands the case of appellant?

The Commission granted the certificate of public convenience and necessity, allowing the Wheeling to abandon its passenger site. The District Court has held, and we submit correctly, that the price at which the abandoned land might thereafter be sold was a "private grievance." It should be allowed to remain such. The aggrieved stockholder, if it have a meritorious case, should have asserted it in another action where the rights of the public would not be involved.

If Wheeling should not be permitted to abandon its passenger station site, that is one thing; whether, after it

shall have been permitted to abandon, it shall sell the same, is still another thing. If an intended sale was to be at a grossly unfair price, general courts of equity were open to the disgruntled stockholder. If it be abandoned property no longer in use for railroad purposes, the Terminals Company would have its right to condemn. These observations are only for the purpose of showing that there were other avenues open and that the general question of public convenience and necessity ought not to be embarrassed through a consideration, at appellant's request, of this collateral issue. Although the possible sale here involved was negotiated in 1928 there is not in the record a suggestion that the Messrs. Taplin have ever offered or have produced anybody else who would offer, or consider paying, a higher price for the land.

We submit that where an injunction is sought, the result of granting which would be to destroy or greatly impair an important public improvement, Courts do hesitate and will not grant the relief if the motives of the would-be enjoiner are questionable, or if there be other remedies open either in law or equity for the protection of his financial interest.

In the case of *New York City v. Pine,* 185 U. S. 93, the city began the construction of a dam upon a river in New York State for the purpose of supplying water to residents of New York. A branch of the river flowed from New York State into Connecticut. The city at the expenditure of several hundred thousand dollars acquired lands and various rights for the construction of its reservoir and expended $45,000.00 in the construction of the dam itself. Plaintiffs, citizens of Connecticut owning land along the Connecticut branch of the river, brought an action against the City of New York to restrain it from the construction of the dam, on the ground that they would suffer

substantial damage by the diversion of water; that the respondent had no power to appropriate such water or prevent its natural flow into the State of Connecticut; that the plaintiffs had legal right to the natural flow through their farms in Connecticut and could not be deprived of that right by the City of New York. It appeared from evidence that several thousand people in New York were dependent upon this water supply.

The trial court perpetually enjoined defendants from in any way preventing the water from flowing through its natural channel.

The Supreme Court reversed, and in so doing said:

"We assume without deciding that as found by the Circuit Court the plaintiffs will suffer substantial damage by the proposed diversion of the water of the West Branch. Also without deciding we assume that although the West Branch above the dam and all the sources of supply of water to that branch are within the limits of the State of New York, it has no power to appropriate such water or prevent its natural flow through its accustomed channel into the State of Connecticut; that the plaintiffs have a legal right to the natural flow of the water through their farms in the State of Connecticut and can not be deprived of that right by and for the benefit of the City of New York by any legal proceedings either in Connecticut or New York; that a court of equity, at the instance of the plaintiff, at the inception and before any action had been taken by the City of New York, would have restrained all interference with such natural flow of water.

"Notwithstanding these assumptions, we are of opinion that the decree ought not to stand, and for these reasons:

"This is not a case between two individuals in which is involved simply the pecuniary interests of the respective parties. On the one side are two individuals

claiming that their property rights are infringed—rights which can be measured in money, and that not a large sum; on the other hand a municipality undertaking a large work with a view of supplying many of its citizens with one of the necessities of life. According to the averments in the bill the City had been engaged in this work for two years and had nearly completed the dam. * * * It is true the testimony discloses that the plaintiffs and the City had been trying to agree upon the amount of compensation, but that shows that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. It is one thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril. In the former he may well assume that payment of a just compensation will be accepted in lieu of the right. * * * Further, the testimony shows that the City was settling with other parties similarly situated, paying out large sums of money for the damages such parties would sustain. So it is not strange that the City acted on the assumption that the only matter to be determined was the amount of the compensation.

"If the plaintiffs had intended to insist upon the strict legal rights (which for the purposes of this case we assume they possessed), they should have commenced at once, and before the City had gone to expense, to restrain any work by it. * * * If this injunction is permitted to stand the City must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one."

This doctrine is recognized in:

Arizona Copper Co., Ltd. v. Gillespie, 230 U. S. 46;
Georgia v. Tennessee Copper Co., 206 U. S. 230.

In the latter case, injunctional relief was granted, but the reason therefor was that the complainant was the sovereign State of Georgia for the opinion says (238):

> "Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendant's business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place."

The rule has been frequently recognized and given practical application in Courts of Appeal, as note, *Mountain Copper Co., Ltd. v. United States,* 142 Fed. 625.

But we think this Court has very recently announced the rule which should go far toward disposing of the case at bar, when the Court said:

> "Congress has manifested its solicitude that the power to grant writs of injunction against orders of the Interstate Commerce Commission shall be exercised with special care, by requiring the consideration of applications to be made by three judges and by giving an appeal directly to this Court both in the case of interlocutory orders and final decrees. *Virginian Ry. v. United States,* 272 U. S. 658, 672. But there is nothing in the legislation to suggest that, in the exercise of the judicial power in respect of such writs, pertinent principles of equity, as theretofore understood, are to be disregarded or modified."

Alabama, et al. v. United States, et al., 279 U. S. 229.

Shall the certificate of the Interstate Commerce Commission, issued after a very full hearing, permitting Wheeling to abandon this land, be set aside? Are the equities on this question in favor of The Pittsburgh & West Virginia Railway Company? Shall it be allowed to destroy this new Union Passenger Station project or subject its owners to an additional expenditure of $10,000,000 and its users to risks and dangers? For the evidence is that a station on any other grade than elevation 52 would be without precedent and its operation fraught with real danger to life and limb. (Rec. pp. 298, 304, 305.) Or are the equities in favor of The Cleveland Union Terminals Company which has spent scores of millions of dollars in reliance upon orders and decrees of the Interstate Commerce Commission? Or, if we may look beyond the Terminals Company and the injury to it, are the equities in favor of the City of Cleveland and its inhabitants and all of those members of the traveling public who will be benefited by this great public improvement?

III. WHERE CONGRESS HAS ACTED STATE STATUTES ARE WITHOUT EFFECT.

In the brief of Counsel for appellant (pp. 97 to 109, inclusive) it is claimed that the order of the Interstate Commerce Commission is void, because

(a.) It provides for a change in Wheeling's termini.

(b.) It is an aid and a sale of part of a railroad to another railroad and a lease of part of a railroad to another railroad.

(c.) It is an extension of Wheeling's line of railroad.

This claim is based upon the assertion that before the Wheeling or the Terminals Company could invoke the jurisdiction of the Commission in the applications for the orders and certificates which were issued by the Commis-

sion provision should have been made for action by the stockholders of the two companies.

The sections of the Ohio code relied upon by counsel for appellant are the following:

(a.) Section 8746 (Appendix), which provides that the articles of incorporation of a railroad company shall state the termini of the road.

(b.) Section 8747 (Appendix), which provides for a change in the termini of a road.

(c.) Section 8806 (Appendix), which provides that one railroad company may aid another in the construction of its road by means of subscription to its capital stock or otherwise.

(d.) Section 8807 (Appendix), which provides that a railroad company may lease or purchase any part or all of another railroad.

(e.) Section 8808 (Appendix), which provides that two or more railroad companies whose lines are connected and not competing may enter into any arrangement for their common benefit, etc.

(f.) Section 8809 (Appendix), which provides that none of the things in 8806, 8807, 8808 or 8809 shall be done without a vote of the stockholders of the road.

In making these claims counsel for appellant have evidently overlooked some basic considerations, as follows:

First, The Cleveland Union Terminals Company, as hereinbefore pointed out, is not a railroad company. It is clearly designated in the Ohio Code as a "public service corporation other than a railroad." Hence none of the sections relied on have any application to it.

Second, The user contract, so-called, is not a lease and does not come within the terms of any of the sections of the Ohio General Code relating to the leasing of its road

by one railroad company to another railroad company. This user contract is clearly a service contract and nothing more.

Third, A casual reading of Sections 8806 and 8808 of the Ohio Code discloses at once that nothing involved in this record constitutes either the aiding by one railroad company of another "by means of subscription to its capital stock or otherwise," nor does it constitute entering into an arrangement for their common benefit, as provided in those two sections.

Fourth, The abandonment by Wheeling of its Ontario Street depot and the taking by it of depot quarters in the union terminal four hundred feet westerly thereof does not constitute a change in the termini of its railroad.

The foregoing questions have been fully discussed in the brief filed by Wheeling and we mention them here as preliminary to the proposition that everything involved in the certificates and orders of the Interstate Commerce Commission herein involve matters which are exclusively within the jurisdiction of the Commission and they cover a field in Interstate Commerce which Congress has fully occupied.

We contend that not one of these statutes can avail as the law to disturb or affect interstate railroads, control of which, especially and particularly as to terminals and connections, has been vested by Congress in the Interstate Commerce Commission. The only exception to this rule is stated in a note to *People v. Chicago, etc. Ry. Co.,* 7 Amer. & Eng. Ann. Cas. 1 at page 5:

> "Although Congress is given by the Federal Constitution exclusive power to regulate commerce among the several states, and the states are thereby impliedly forbidden to pass any law interfering with Interstate Commerce, the states have power to subject railroads carrying interstate commerce, to reasonable police

regulations, even though the regulations may incidentally affect interstate commerce."

There are many decisions stating the rule but the two most authoritative and direct are hereinafter stated.

Under the Transportation Act of 1920 power to control terminals and its connections is vested in the Interstate Commerce Commission by Sec. 402, pars. 18 to 21 and the only exception to the general control vested in the Commission is stated in par. 22, as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

In the Los Angeles Union Depot case, *Railroad Commission v. S. Pacific Company,* 264 U. S. 331, the first syllabus reads:

> "In view of the policy and provisions of the Transportation Act, establishment of a new union station for several interstate carriers, involving the abandonment of their separate stations, extensive changes and relocations of their main tracks and very great expense, cannot be brought about by voluntary action of the carriers or order of a state commission in the absence of a certificate of the Interstate Commerce Commission, under pars. 18-21 of Sec. 402 of the act."

Chief Justice Taft, in his opinion (341), says:

> "Our only question here is whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920."

The Court answers the question in the affirmative.

In *Alabama Ry. v. Jackson Ry.*, 271 U. S. 244, the court says:

> "Since the enactment of the Transportation Act of 1920 the jurisdiction to determine whether a junction may be established between two main lines of railroads, both engaged in interstate as well as local commerce, is exclusively in the Interstate Commerce Commission."

The statutes of Ohio above cited and relied on by plaintiff are regulations affecting and controlling termini, terminals and connections, and extensions of railroads engaged in Interstate Commerce. The jurisdiction to inquire into such matters in all their ramifications is *exclusively* in the Interstate Commerce Commission, as stated in the above decisions. In the *Alabama Ry.* case, *supra,* the Supreme Court of Mississippi had held that the authority and sanction of the Mississippi statutes relating to junctions of such railroads were controlling because Congress "had not taken full control of the subject" (p. 247), and because they "did not interfere with interstate commerce to an appreciable degree, if at all." On writ of error the United States Supreme Court held as indicated in the syllabus and finally placed the determination of all questions involving terminals, connections and extensions in the Commission, as stated by Mr. Justice Brandeis on p. 250:

> "In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, with the exceptions specifically set forth in paragraph 22, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."

In *Erie Railroad Co. v. People of State of New York,* 233 U. S. 671, the first syllabus is as follows:

> "When Congress acts in such manner as to manifest its constitutional authority in regard to interstate

commerce the regulating power of the State ceases to exist, and if there is conflict between state and Federal legislation the former must give way.

After Congress acts on a matter within its exclusive jurisdiction there is no division of the field of regulation."

In *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, the court said (478) of the Transportation Act:

"The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. * * * To achieve this great purpose it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

In *Southern Railway Co. v. Shealy*, 18 Fed. Rep. (2d), 784, at p. 788, the court says:

"Numerous decisions of the Interstate Commerce Commission and of the states since the passage of the Transportation Act are to the effect that Congress has fully occupied the field of regulation of terminal facilities by placing the control thereof as relates to interstate railroads in the Federal Commission. *Team Track Switching at Argentine*, Kansas, 73 Interst. Com. Com'n. R. 367; *Hastings Commercial Club et al. v. C. M. & St. Paul Ry. Co.*, 107 Interst. Com. Com'n. R. 208; *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 190 Cal. 214, 211 P. 460; *People v. Public Service Commission*, 233 N. Y. 113, 135 N. E. 195, 22 A. L. R. 1073."

In view of the foregoing authorities and in view of the character of the state statutes relied upon by appellant, as affecting the validity of the orders of the Interstate Commerce Commission, it must be concluded that Congress has completely occupied the field with reference to all matters relating to interstate carriers and commerce, save as expressly excepted in paragraph 22, and that all state laws or state commission orders are without any force and effect as opposed to the orders of the Interstate Commerce Commission acting in its peculiar field.

IV. THE CLEVELAND UNION TERMINALS COMPANY IS NOT A RAILROAD COMPANY.

Appellant's counsel present many propositions, all bottomed on the erroneous assumption that the Terminals Company is a railroad company, subject to all of the laws and regulations which pertain to railroad companies. In all enactments, both state and national, it is not in any such sense a railroad company, nor does it own and operate a line of railroad within the contemplation of the language of such laws. In the codification of the law of Ohio, Title IX is devoted to private corporations. Division II is devoted to public service corporations. Sub-division I of Division II is devoted exclusively to railroad companies, and Sub-division II is entitled—"Public Service Corporations Other Than Railroads." Chapter I of Sub-division II is devoted exclusively to—"Union Depot Companies," and it is under Sections 9160, *et seq.*, of this Chapter that the Terminals Company was organized.

The first mentioned section, stated briefly, provides that five or more persons may become a corporation for the purpose of purchasing or leasing depot grounds and locating, constructing and maintaining a common or union station house, passenger or freight depot, or both, and terminal and connecting tracks for the use of steam railroads,

or of both steam and electric railroads. Such company may also acquire, construct and operate in connection with its terminals and station a terminal railroad with two or more tracks connecting the railroads of one or more companies.

Section 9162 gives to such companies the power and right to acquire rights of way and depot grounds and terminals and to have all the powers given the railroads by the laws of the state for the purpose of acquiring, constructing and operating their depot tracks and terminals. Section 9163 permits the stock of such companies to be held by such railroad companies as agree to use the station and terminals in such proportions as railroad companies may agree upon.

The charter of the Terminals Company is in evidence (Exhibit No. 68) and that charter is in complete harmony with the statutory law of Ohio above mentioned. A mere reference to the title of the sub-division and the title of the first chapter thereof clearly shows that the Ohio Legislature intended to exclude, and did exclude, "railroad companies" as such from "Union depot companies" as such.

Union depot companies may be incorporated not only "for the use of steam railroads," but also for the use of "both steam and electric railroads."

There is nothing whatever in Sub-division II which requires or even suggests any action on the part of the stockholders of a union depot company in respect of the matters now under discussion. This view is greatly strengthened by the fact that Section 9162 provides that Ohio union depot companies "shall have all the powers given to railroads by the laws of this state for the purpose of acquiring, constructing and operating its depot, tracks and terminals." Here is a clear grant of power and it is plain that, except within the limits of the purposes so described, such companies shall not have any of the other powers given to railroads. It would seem equally clear that the Legislature

did not intend to impose upon such companies the restrictions imposed by it upon railroad companies, except only such restrictions as may be inherent in the powers granted. The Ohio Legislature has not anywhere provided that union depot companies are required to observe all of the requirements to be observed by railroad companies.

It would seem quite manifest, therefore, that the Terminals Company is not a "railroad company" within the contemplation of the meaning of those words as used in statutory enactments, and further, that it does not own and operate a line of railway.

Such is also true under all Federal legislation here involved. It is, of course, subject in many respects to the control of the Interstate Commerce Commission, but, apparently in recognition of the fact that such companies were not railroad companies, the Congress, for all purposes of the Interstate Commerce Act, brought such companies in by definition:

> "The term 'railroad' as used in this Act shall include * * * terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein * * *."
>
> Sec. 1 (3), Interstate Commerce Act.

That such companies are not "railroad companies" is further recognized and declared by the Supreme Court of the United States.

In the so-called *St. Louis Terminal Railroad Association* case (224 U. S. 383) the Court said (401):

> "We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility."

And again the Court, in answer to the contention that the Terminal Company there involved was an illegal combination of competing lines of railroad, referred to a decision of the Supreme Court of Missouri as follows (402):

> "The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and facilities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies the Missouri court said:
>
> > 'A more effectual means of keeping competition up to the highest points between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switching connections or else cart his product to a distant part of the city at a cost possibly as great as the railroad tariff.' "

V.—THE WHEELING-TERMINALS USER CONTRACT IS VALID.

The claim of appellant that the Terminals Company is such a common carrier as is required by statutory law to make and publish tariffs, is set at rest by a consideration of all of the statutory law upon that subject. Its brief quotes certain paragraphs of Section 6 of Title 49 U. S. Code, but omits paragraph (1) of that Section, which is as follows:

> "Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and

charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Even slight consideration of this paragraph shows that a terminal company duly organized for the purpose of operating a union passenger station is not within the contemplation of that law requiring the filing and publication of tariffs. The same observation may be made as to the kindred Ohio law of Section 505 of the Ohio General Code, which is quoted on page 52 of the brief of appellant.

Appellant argues that the sale price of Wheeling's abandoned property is so low and so unfair to Wheeling

that such sale should not be permitted. In contrast it is interesting to note that the watchful stockholder of Wheeling also complains that the so-called user contract is so favorable to Wheeling that its performance should be enjoined. Such shiftings of position may well raise the query as to whether or not appellant is, in good conscience, acting as Wheeling's faithful stockholder.

Appellant's complaint as to this contract seems to be:

(a) That the annual payment of $20,000.00 for the first five years is less than the cost to the Terminals Company of rendering the service, and that some time somebody will complain to some Commission or to some court, with the result that the annual compensation will be greatly increased; and

(b) That if Wheeling then or ever attempts to exercise its right to cease using Terminals' facilities and receive the money provided by the contract to be then paid to it for the purpose of building its own station, complaint will be made and such conduct enjoined.

This so-called user contract (Exhibit No. 15) was made by the Wheeling and the Terminals Company on November 27, 1928. Attached to it is the express approval of the Central, the Big Four and the Nickel Plate Companies, which were the sole stockholders of the Terminals Company owning their stock in "such proportions as said railroad companies may agree upon" as specifically permitted by Section 9163 of the Ohio General Code, which stock ownership in those proportions was approved by the Interstate Commerce Commission on December 6, 1921 (Exhibit No. 55).

Under that contract the Terminals Company must construct and maintain the necessary connecting track with Wheeling's lines, and do such other things as may be necessary to render to Wheeling such passenger facilities and services as are usually furnished at passenger stations.

For such facilities and service Wheeling shall pay for the first twenty-five years $20,000.00 per annum, based on three thousand trains or fourteen thousand cars handled, subject to increase for any year in the proportion by which the number of Wheeling's trains exceeds three thousand or the number of its cars exceeds fourteen thousand. Certain other increases are provided for handling cars from or to certain points of origin or destination. A temporary user of the Erie's passenger station and tracks of the Big Four and Erie shall be provided for Wheeling at the expense of the Terminals Company.

The contract shall continue for an initial period of twenty-five years and Wheeling has the option to renew it for another period of twenty-five years on the same conditions, save that the annual payments shall be increased to the extent justified by any increase in operating costs directly attributable to the service rendered with provision for arbitration as to the annual payments in this period if the parties are unable to agree, and with the still further provision that Wheeling, if dissatisfied with the award, may, within three months, terminate the agreement. If the agreement be renewed for this twenty-five year period, then Wheeling has the right to extend the contract for a further period of fifty years upon such terms as may be mutually agreed or determined by arbitration, Wheeling reserving the right to not avail itself of the option if the arbitration award be unsatisfactory.

During the first fifty years, however, Wheeling may terminate the contract at the end of any five year period by giving one year's notice in writing of its intention. In other words, Wheeling is only absolutely bound for periods of five years during the first fifty years.

If Wheeling shall ever claim that the facilities or service are unsatisfactory and the parties cannot come to an agreement in respect thereof, the matter shall be re-

ferred to arbitrators who shall have power to prescribe the facilities and services to be rendered, and here, if Wheeling be dissatisfied with the award, Terminals is obligated to pay it, as liquidated damages, the cost of constructing a passenger station for Wheeling upon land to be furnished by Wheeling, such cost not to exceed $200,000.00.

We very seriously doubt whether the law required the submission of this contract to the Interstate Commerce Commission and its approval by the Commission. There is no clear statutory command that such be done. There is statutory law strongly suggesting that it is not necessary so to do.

In at least two separate instances the Interstate Commerce Act gives the Commission not the power to permit, but the power to compel, over the objection of the owner of terminal facilities, the use of such by an outside carrier. (49 U. S. C. Sec. 1, par. (15) and Sec. 3, par. (4)). The former section provides for the exercise of the power by the Commission in times of emergency, while the latter Section is unlimited in this respect. Each Section came into existence *for the first time* in the Transportation Act of 1920. The original Interstate Commerce Act was passed in 1887, and, although during the many years intervening many amendatory and supplementary Acts have been passed by the Congress, many of which gave to the Interstate Commerce Commission a greater and fuller and more exclusive jurisdiction over Interstate agencies and facilities, yet not until the Transportation Act were specific provisions enacted into law on the subject matter now under discussion. It is not to be assumed that the Congress through oversight, carelessness or loose thinking enacted for the first time the provisions of the Transportation Act now under discussion. In each of the two instances the Interstate Commerce Commission was given the power to

require a common use of terminals and incidental tracks if in the "public interest" but in each case the interested carriers were given the right to agree upon the terms of the user and only after a failure to so agree was the Commission empowered to fix terms, conditions and compensation.

Apparently, the Congress was never of the opinion that, on the one hand, carriers owning a terminal and, on the other hand, carriers desiring the use of a terminal would enter into a contract which would or could destroy the effect of the finding which the Interstate Commerce Commission was compelled to make; namely, that the joint use should be in the public interest. The Legislation assumed that each carrier would make the best contract possible for itself under all of the circumstances and conditions existing.

In harmony with this law the so-called proprietary contract, approved by the Commission in 1921, contained a provision that the Terminals Company should have, at all times, the right to admit other steam roads entering Cleveland to use the terminal "upon terms and conditions to be agreed upon" between the parties and "approved by the Railroads." The Commission, at that time, did not attempt to insert a provision that such subsequent contracts should receive its approval. This user contract has received the approval of the Proprietary Railroads.

It would seem quite clear, from a consideration of the language of the recent *Los Angeles Passenger Station* case, that the statutory law, just above referred to, has application only to those cases where railroads, either separately or through a direct joint ownership or leasing, own or control terminal facilities. The Court said in that case:

> "In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, there is nowhere express authority for the establishment of union passenger sta-

tions, compulsory or otherwise. Emphasis is put on physical connection between the tracks of one carrier and others, if permitted by the Interstate Commerce Commission, and if properly paid for, either by agreement or condemnation, by the carrier enjoying the use of the track of the other companies."

280 U. S. 52.

The case at bar does not present one or more carriers owning directly a terminal facility, but a separate legal entity itself owning and controlling a plant and facilities for conducting a union passenger station. It is not even pretended, much less claimed, by the appellant that this corporation, The Cleveland Union Terminals Company, is but a makeshift. There is, of course, no question of compulsion involved, but we submit that, if in those instances where the Interstate Commerce Commission may compel one carrier to permit another to use its terminal facilities, the interested carriers may themselves agree upon the compensation to be paid for such user, much more strongly does it follow that the Wheeling and the Terminals Company may themselves agree to the terms and conditions under which Wheeling shall enter the new Union Passenger Station and receive the benefit of its facilities.

True this user contract contained the provision that it was made subject to all existing and future Federal or State laws and to all rules and orders of regulatory bodies and commissions, including, particularly, the Interstate Commerce Commission. It has received the approval of the latter Commission. We do not assume, however, that, by such provisions or by such submission to the Commission, jurisdiction was conferred upon the Commission if it did not have it under existing law.

Texas & Pacific Ry. Co. v. Gulf etc. Ry. Co., 270 U. S., 266.

But the Commission did authorize and approve this contract.

The objections made to this contract are directed not only at the conclusions of the Commission but at the Commission's findings and lack of findings as to matters more or less germane to the contract. The Commission did do one thing that is clear and definite,—it specifically found that "the present and future public convenience and necessity *require*" the Wheeling to acquire these facilities and services in the union depot of the Terminals Company, all as set forth in Wheeling's application in Finance Docket No. 7298. The appellant seems to largely, if not wholly, overlook the fact that in all such applications as those under consideration the public convenience and necessity combined is the paramount matter to be considered and decided by the Commission.

The Commission in its opinion (Exhibit A to Amended Bill of Complaint, R. p. 52) said:

> "The protestant does not seriously controvert the fact that the public convenience and necessity would be better served by the applicant's using the facilities and service of the union depot, nor, on the record before us, can that fact be doubted."

Indeed, no serious question is now made as to this public convenience and necessity, but appellant seeks to avoid that question by the adoption of a mere slogan to the effect that anything which is contrary to law cannot be for the public convenience.

Complaint is made as to findings and the lack of findings by the Commission, but appellant seems to be forgetful that:

> "In orders of this kind, not including an award of damages, formal or precise findings no longer are necessary; Sec. 14 having been amended in this respect by Act of June 29, 1906, c 3591, 34 Stat. 584."
>
> *Manufacturers Ry. Co. v. U. S.*, 246 U. S. 457 (487).

It cannot be seriously argued that the Wheeling itself did not need new passenger facilities, nor can it be contended that the city of Cleveland did not need a new union passenger station. What was to be done? It was impossible to have the latter without the abandonment of Wheeling's passenger station, because it completely blocked the easterly approach to the Union Depot.

The time had come in the growing city of Cleveland when it became absolutely necessary for the Wheeling to have new terminal facilities. Wheeling's downtown passenger station erected in 1909 under a license from the city of Cleveland to use it for one year only had far outlived its life and its usefulness. It was torn down because the Wheeling's officers feared a real catastrophe. By far the Wheeling's important business is the transportation of freight and this circumstance had to be taken into account by the Wheeling in determining just what kind of a passenger station it could or would build as contrasted with its opportunity to go into the new and much better union depot of the Terminals Company. The Wheeling's proper officers decided upon the latter course provided a rental could be agreed upon. As a result of much consideration entry into the Terminals' station was agreed upon, subject to price, and after much negotiation the contract before this Court was entered into. All of those matters now argued to this Court were argued to the Commission and, in the exercise of the power given to it by Congress and in the performance of its duty, it approved this contract.

We submit that in arriving at its conclusion it was not, under the authorities, limited to a mere consideration of dollars and cents, although that was one matter for consideration. It was also its duty to, and it did consider, the question of public convenience and necessity; the present need, long existent, of Cleveland for a new union passenger station; the existing needs of the railroads whose lines

entered Cleveland, and particularly those which are to enter the new union station; whether or not it should, by withholding its certificate of convenience and necessity in this case, compel the Wheeling for the accommodation of a comparatively small passenger traffic to build and maintain a station of its own for that service, against General Manager Durham's opinion that the Wheeling could not afford to build a passenger station; that if it did it could not give the service it will get in the Union Depot (R. p. 245) and that going into the latter will help to hold Wheeling's passenger traffic now in danger of being lost (R. p. 246); whether doing so would impose a burden upon the Wheeling which might unduly embarrass the performance of its other public duties; whether by so doing it would impose burdens upon the Terminals Company and its proprietary railroad companies which were not in the public interest and which might unduly burden them in the performance of their duties.

All such questions, and more, which will readily occur to the mind of the Court, are properly to be taken into account by the Interstate Commerce Commission in arriving at a proper conclusion as to the performance of the purely administrative functions committed to it. Since it granted the certificates the presumption is that it gave full consideration and weight to all of these matters and exercised that discretion which cannot be modified or annulled by the courts.

The questions here presented are not legally different from those where an application is made to the Commission for leave to abandon a part of its line of railway. In discussing the duty and power of the Commission in such a case, this Court has said:

> "The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise

thereon the judgment whether abandonment is consistent with the public convenience and necessity, Congress has conferred upon the Commission."

Colorado v. United States, 281 U. S. 153.

In speaking of the Transportation Act of 1920 this Court has said:

"The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railway an opportunity to earn enough to maintain their property and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply, and distribution, their joint use of terminals, their construction of new lines * * *."

Dayton-Goose Creek Railway Company v. United States, et al., 263 U. S. 456 (478).

And again in speaking of this same Act, this Court said:

"It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous."

Railroad Commission of California v. Southern Pacific Railroad Company, 264 U. S. 331 (343).

If it be true, as contended by appellant, that terminal facilities must be given, if at all, without discrimination and that the Interstate Commerce Act has application in such matter the same as in freight rates, track connections

and the like, then it is important to note that it is not every difference and every discrimination that becomes unlawful, but only those which are unjustly or unduly discriminatory.

This Court had before it the question of a division of rates as between certain carriers and a terminal railroad which was for all practical purposes owned by a large brewery company at St. Louis. In disposing of the questions there presented, this Court said, among other things:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission, * * * and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. * * *
>
> "In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. * * * The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. * * * The common use of the St. Louis terminal by the fourteen trunk lines under a single arrangement as to absorption of the terminal charges does not, as a matter of law, entitle the Railway, which has no trunk line and does terminal switching alone, to precisely the same treatment."

Manufacturers Railway Company v. United States, 246 U. S. 457 (481-2).

The Commission had directed certain steam railway lines, interchanging traffic with each other, to remove a discrimination against a very small electric line with which

the steam carriers did not exchange traffic, and the steam carriers sought to set aside the order. In answer to their contention that the conditions under which there was an interchange of switching service as among them, were essentially dissimilar to those under which the service would be performed for the electric line, pointing out the latter's lack of physical connection with certain of the steam lines, its own limited terminal facilities, its small number of freight cars and the fewness of industries on its line, this Court said:

> "Despite these facts the Commission found that the circumstances and conditions were similar. The court cannot substitute its judgment for that of the Commission. * * * The alleged lack of reciprocity and the other facts stated do not constitute, as a matter of law, differentiating circumstances which negative discrimination."
>
> *C. I. & L. Railway Company v. United States*, 270 U. S. 287 (294).

It should be remembered, at all times, that this user contract and the contract for the sale of Wheeling's lands after abandonment, were negotiated contemporaneously. The appellant argues that the user contract is too favorable to Wheeling—indeed so favorable that it will some day be upset by some court. It argues, on the other hand, that the sale contract is so unfavorable to Wheeling that its performance should now be enjoined.

Appellant contends for much solely because Wheeling's president, Mr. Duncan, testified that these contracts, *so far as Wheeling was concerned*, were kept separate and apart and that Wheeling, in executing either one, was not at all influenced by the execution of the other. It may be that Wheeling's executives could keep themselves in this mental condition. There is no proof that the executives

and directors of the Terminals Company and of the Building Company were similarly uninfluenced. Mr. Lewis, the chairman of the Commission, in his concurring opinion said:

> "There is in my mind no doubt that, so far as those with whom the carrier dealt (*sic*) the $1,600,000.00 paid by The Cleveland Terminals Building Company, a non-carrier corporation, and the $20,000.00 service contract made by the Terminals Company, tie in together; that jointly they are in consideration not only of the land conveyed and the carrier's giving up its opportunity to maintain a downtown station, but also are the result of the practical necessity of getting the Wheeling & Lake Erie out of the way of a successful and early working out of the terminal station plans. The carrier occupied a blocking location, intensified by new conditions created by the city of Cleveland building the Eagle Avenue viaduct. This dictated the two deals."

The only suggestion of the members of the Commission who wrote separate concurring opinions was that some such recital should be written into the user contract, so that the considerations which influenced the parties to the contract should be fully expressed and this only, out of abundance of caution, to further fortify the Wheeling whenever any person might attempt to enforce an increase in the amount it should pay for its terminal facilities.

The District Court in its opinion said:

> "The two applications, the one to acquire terminal facilities in the Union Depot, and the other to abandon Wheeling's present Ontario Street Station are inseparably connected, were heard and determined together before the Interstate Commerce Commission, and the certificate of the Commission is made the subject of the main inquiry in this action."

And again that Court said in its opinion:

> "The contracts for the purchase of this property and for granting terminal facilities to Wheeling are wholly interdependent, and the cash consideration to be paid Wheeling is predicated not alone upon the strict value of the property as such, but rather upon its value in consideration of the substitution of another terminal. The two contracts must be considered as one, and the consideration as single."

In other words, both the Interstate Commerce Commission and the three judge court have found *as a fact* that these two contracts go along hand in hand and that they cannot be divorced for the purpose of upsetting the decision of the Commission which has full and exclusive power to determine the facts.

The District Court further said:

> "Terminals must obtain the property and, considering the impossibility of condemning it or its acquisition otherwise than with the consent of Wheeling, the ability of Wheeling to pay, and other surrounding circumstances, a contract whereby Wheeling conveys the property for a cash consideration of $1,600,000.00 and an agreement for substituted terminal use at a rental of $20,000.00 per year for Wheeling's contemplated needs, instead of a much higher rental which could only be obtained as income from the surplus of a much higher cash consideration, appeals to the Court as just and reasonable to both parties. No more satisfactory arrangement from either standpoint, public interests considered, could be made."

Furthermore, the line of the Wheeling is not a through line at Cleveland. Its trains will come in to the station from the south and depart therefrom to the south. The proprietary lines are either systems, or parts of systems, with through traffic east and west. Their traffic and their requirements are much greater than and differ widely from the traffic of the Wheeling. While the Terminals Com-

pany's electric locomotives will haul New York Central trains on the eastern approach for approximately ten miles and on the western approach for six miles, and the Big Four trains for a like distance, and the Nickel Plate for an approximate distance of three miles on the eastern approach and two miles on the western approach, *they will haul those of the Wheeling for a distance of only approximately two thousand feet.* (Rec. p. 389 and 393)

The amount of money to be charged against the so-called proprietary lines for the handling of their respective trains (from East 40th Street to West 37th Street and through the station) has not been definitely fixed. These charges will be borne by the Terminals Company in the first instance, but later apportioned to the proprietary lines on some unit basis (R. p. 393).

There is in the Union Station a large area referred to and known as the "Concession Area," being that area which is to be sublet for shops, restaurants, barber shops and kindred businesses, all of which would aid the convenience of the traveling public and provide revenue to the Union Depot Company. This Concession Area has already been let, together with track accommodations and other accommodations, to The Cleveland Traction Terminals Company. That contract is in evidence (Exhibit No. 101). Very briefly stated that contract provides for a minimum annual rental to be paid by the Traction Terminals Company to the Union Depot Company of $850,000.00. The contract, however, abounds with provisions for the payment of other sums by the Traction Terminals Company, all of which lighten the burden upon the Union Depot Company, and that contract also contains numerous provisions for the increase of the annual rental to be paid accordingly as the income to the Traction Terminals Company shall increase. These provisions are too numerous to be set forth here, but they can be very readily picked out

by any member of the Court interested in going into the detail.

Furthermore, it must be remembered that, speaking in approximate figures, seventeen acres of so-called air right area still belong to the Union Terminals Company, over which it has the right to build office and business buildings such as the Builders' Exchange Building, the Medical Arts Building, and the Midland Bank Building.

From all of this it necessarily results that there is and can be no showing whatever that any unequal burden will be placed upon proprietary or other carriers and no showing that any such burden would interfere with interstate commerce or that the excess burden of cost, if any such there should be upon those proprietary lines, would render them, or any of them, in any wise unable to perform their public duties with that efficiency to which the public is entitled. Certainly in the absence of any such showing no complaint can be made by any party and certainly not by a party or a stockholder thereof who claims that it is reaping too great a financial gain. In other words, in the absence of such a showing the loss, if any, to the proprietary lines is suffered by their respective stockholders and conversely the gain to the Wheeling is a gain to its stockholders.

The necessary effect of granting the certificate authorizing Wheeling to enter the Union Depot under the exact contract before the Commission was a negative finding by the Commission that the Wheeling should not be compelled to expend its moneys for the erection and maintenance of a downtown passenger station in the city of Cleveland for its comparatively small passenger traffic. In such determination we submit the paramount interest is the public interest; the lesser interest is the complaining stockholder interest and especially so when that stockholder interest is another railway company whose motives may well be questioned in a court of equity.

In the *New England Divisions* case, 261 U. S. 184, one reason advanced by the offended carriers in support of their claim that the order of the Commission was wholly void was that the order dealt only with the division of the joint rates at the Hudson River as between the New England carriers and the Western carriers, and that the order did not make a distribution of the rate as among the several carriers. This Court said:

> "The duty imposed upon the Commission does not extend beyond the need for its action. If the real controversy is merely how much of the joint rate shall go to the carriers East of Hudson River and how much to carriers West, there is nothing in the law which prevents the Commission from letting the parties East of the River and likewise those West of it apportion their respective shares among themselves."

In disposing of the contention there made that the parties were not given that full hearing which the law requires, this Court said:

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law of the step asked to be taken. The Commission recognized and observed these essentials of a full hearing."

The record in the case at bar discloses that the parties were afforded every opportunity to put in whatever evidence they desired and that they availed themselves of this opportunity to a very large extent. The Commission has acted upon the evidence submitted to it; it has exercised that judgment and discretion which it is its sole right to exercise.

It would seem wholly unnecessary to concern ourselves or the Court with the second fifty year period of the contract under discussion;—that period is far removed and

the presumption is that by virtue of the provisions contained in the contract itself new terms and new figures will be made for that period of time to fit the conditions then existing which conditions no commission and no court is wise enough to now foresee.

It may be looking too far ahead to look beyond the first twenty-five year period of the contract, for there are provisions in the contract which may work a change in the terms of it for the second period.

In harmony, as we believe, with the statutes and decisions hereinbefore referred to, and upon the evidence and findings hereinbefore referred to, the District Court was of opinion that this user contract was valid for, after referring to Sec. 3 par. (4) 49 U. S. C. that Court said (R. p. 493):

> "We are of the opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this Section supersedes the previous requirement of law, if any, as to exact similarity in terms, and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration the financial condition of the contracting parties, the ability to pay, the use required and all other surrounding circumstances."

We emphasize that the appellant's claim is not simply that the Wheeling Company of which it is a stockholder is receiving something that it is not entitled to. Its real claim is either that the Terminals Company is not to receive from Wheeling an amount of money commensurate with the services which the Terminals Company is to render for Wheeling; or that the Proprietary Railroads—stockholders of the Terminals Company—or some other railroad which may later come into the Union Depot, will make some complaint or institute some action, and that the necessary result thereof will be that Wheeling will either have to pay a larger amount for the services to be rendered, or retire from the

Union Station and build a passenger station of its own. In other words, the claim necessarily is that the Terminals Company is itself doing something which, under the law, it cannot do.

There is in the record no showing whatever that the Terminals Company will be unable to perform its duties because of the making of this contract with Wheeling, nor is there any showing that any of the Terminals Company's proprietary lines will lose money or will be damaged because of the making of such contract. There is not even a suggestion that, because of the making of this contract, the Terminals Company will have to increase the rentals to be paid by any carrier now or hereafter entering the Union Passenger Station. Consequently, there can be no suggestion that passenger or freight rates on any lines will be increased or that any service will be diminished.

Assuming that the Interstate Commerce Commission has the right to make an inquiry for the purpose of ascertaining whether or not the proper economical management and operation of any of the interested railroads will be interfered with or impaired (*Lehigh Valley Railroad v. Commissioners,* 278 U. S. 24) its opinion and orders herein constitute a negative finding that such will not be the result.

If the Interstate Commerce Commission has jurisdiction and power to pass upon such contracts, it has done so, and, we submit, upon full evidence and after a full hearing.

If that order now has a final and conclusive effect for the entire period of time covered by the contract, then that is and must be the end of it, and the Terminals Company and the three proprietary railway companies are everlastingly bound thereby. It follows upon facts conceded by appellant that the company of which it is a stockholder has made a very favorable contract. If, however, the appellant be right in the entirety of its argument, then it follows necessarily that no parties ever could make a con-

tract which could continue for any period of time wholly freed from the possibility of a change therein required by an order of the Interstate Commerce Commission. If this be sound it would seem to be equally true that the Commission itself in attaching terms or conditions to such a contract could not enter an order which would bind the Commission for all time to come, or for any particular period of time to come. If this be true, then it would seem that the appellant places itself in the position of contending or admitting that the situation is such that nothing can be done. Surely the National Congress would be amazed to have any court sustain such a contention in view of the wide powers which it has attempted to give to the Interstate Commerce Commission to foster, protect and regulate a complete interstate carriage system for the entirety of the United States.

It would seem to further result from the anomalous position taken by appellant that the Commission should fix the annual payment to be made by the Wheeling for the facilities and services which it is to receive from the Terminals Company so absolutely high as to forever foreclose even the possibility that another carrier or another commission will seek a change. Just what is the position of the appellant in respect of the question now under discussion? In any event the appellant is brought finally to the place where it must confess it is only indulging in possibilities. It has no right to fear that any one will seek to change this contract because the record does not contain a suggestion of an intention on the part of any party so to do. It has not the right to say that there is a probability that any carrier now outside will later come inside the terminal station, for again the record gives no suggestion that any carrier other than those hereinbefore mentioned intends to use the station.

If, however, the Interstate Commerce Commission, or any other regulatory body or court having jurisdiction at any time in the future to consider this contract, to amend it, to take from it, to add to it or to prescribe a different rate to be paid by the Wheeling for the services which it is to receive, should take upon itself such consideration, then it is submitted that such body must necessarily, and that such body will, take into account the fact that the contract was approved and authorized in 1929 by the Interstate Commerce Commission, the only body then having complete administrative jurisdiction over kindred matters, the conditions existing at the time such contract was approved, what the parties have done thereunder and particularly the conditions existing at the time when any such new consideration is to be undertaken. We dare say that at that time the law will be, as it is today, that among other things to be taken into account will be the financial abilities of the interested carriers to pay for the traffic which they handle, and particularly the financial ability of the Wheeling to pay for the services which it receives in connection with the handling of a very small part of its traffic, namely, its passenger traffic.

> "The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided."
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> *Interstate Commerce Commission v. Chi. R. I. & Pac. Ry.*, 218 U. S. 88 (103).

VI. AS TO SALE OF WHEELING'S PASSENGER DEPCT SITE.

Upon the evidence before it, the Interstate Commerce Commission granted the application of Wheeling *permitting but not requiring* it to abandon its passenger station site, finding that for it so to do was in the public interest. It would seem that appellant is not making and cannot make any serious objection to the granting of this application to abandon.

Before the Commission it sought to raise and still raises the question that $1,600,000.00 was an unfair price and that the Commission had and should exercise the jurisdiction to pass upon that question. The Commission held that it had no jurisdiction to control the price at which the Wheeling should sell this property after its abandonment, and when it was no longer used for railroad purposes.

The appellant presented this question to the District Court. Let us see what that Court did on that subject.

Upon the convening of the Court, counsel for the complainant, The Pittsburgh & West Virginia Railway Company, announced their intention to rely upon the record made before the Commission and further oral evidence to be taken in open court, and expressed their desire that thereupon the case be finally submitted. Counsel for all defendants consented that the hearing should be a final one, but counsel for all defendants other than the United States and the Interstate Commerce Commission, made their consent conditional that, if additional evidence should be introduced, they should have the right to offer in rebuttal certain affidavits definitely referred to, and to this latter condition counsel for complainant assented. (R. pp. 484-5) Thereupon the Court announced that the hearing would be considered as involving two classes of questions; namely,

those involving the validity of the order of the Commission as dependent upon the record, and "second, those involving all other grounds of attack upon the proposed action of the defendant and in which neither the United States nor the Interstate Commerce Commission was interested"; and that the hearing would then proceed upon the first class of questions involved, and that the court would later decide whether to dispose of the matter upon those questions or to continue the hearing upon the other questions.

Thereupon the evidence submitted to the Commission was received in evidence "for the present as bearing upon the first class of questions," and the Court reserved the question of its admissibility upon the second class of questions. The journal entry then recites:

> "Thereupon the questions of the first class involved were argued by counsel and taken under consideration by the Court and the remainder of the hearing continued until the further order of the Court."

In disposing of the contention that the certificates issued by the Commission were defective because of the relationship of Wheeling's directors, the District Court, after pointing out that, in any event, their acts were not void but only to be scrutinized with utmost care to determine their fairness, said (495):

> "If this question be open for consideration here, our previous findings must dispose of it."

That is to say, the Court did give all of the pertinent facts close scrutiny and, as a result thereof, found as a fact that the sale contract and the user contract, taken together, were fair under all existing circumstances.

Next the Court gave consideration to the contention that the so-called abandonment contract and the so-called

user contract were both illegal under Ohio law, because they had not been approved by a vote of the stockholders of the parties in interest, and held that State requirements "must yield to the paramount control of the federal government."

The opinion then goes on to say that these latter two matters constitute "private grievances" between the complainants and Wheeling only, in which the other defendants were but collaterally interested, and that they could not be considered by the Court. It thereupon dismissed the bill, observing, in so doing, however, that it did not "overlook the provisions that plaintiff was entitled to offer evidence as to the so-called private grievances, unless the Court should think that, as a matter of law, those alleged grievances must be excluded from consideration in this case. * * * As to those issues we in effect sustain a motion to dismiss."

The District Court in concluding its opinion, and still referring to this subject matter, stated that since the District Judge concurred as to the disposition of those "private grievances" the concurrence of the other two judges could do no harm, and it even suggested that if the appellant thought those questions separable for purposes of appeal, it could preserve its rights. In other words, we assume the Court was suggesting that the appellant might perhaps carry those questions to the Circuit Court of Appeals. It has not done so.

We are of opinion that the three-judge court had the right to entertain jurisdiction as to these so-called "private grievances" and that it did exercise that jurisdiction. It found that it did not care to hear further evidence as to the conflicting interests of the Wheeling directors, because, upon the evidence already before that Court, the contracts made by them were fair to Wheeling. In any

event, the District Judge found that and the other two Judges concurred in the finding and in the decree which followed, because, as stated by them, their concurrence "can do no harm."

It is our further opinion that any appeal from that finding must be prosecuted to the Circuit Court of Appeals. In any event, we do not assume that this Court will concern itself with the disputed questions of fact as to the value of Wheeling's depot site.

After all, the important question presented to this Court and to the lower court is and was whether or not the Wheeling should be allowed to abandon its so-called passenger station site. The Commission found, upon the evidence, that it should be so allowed. Even the appellant does not seem seriously to argue that this permission should not have been given by the Commission. It only argues that the price it is to get for its abandoned property is too small and that the rentals which it is to pay for services in the Union Depot are so favorable that they cannot last.

The Interstate Commerce Commission has found, on all the facts submitted, that both present and future public convenience and necessity *require* that the Wheeling enter the new Union Depot and also that the like public convenience and necessity *permit* it to abandon the real estate composing its heretofore passenger station site. We submit that the orders and certificates should not be set aside and that this appeal should be dismissed.

We are authorized by solicitors for the Erie Railroad Company and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company to say that, inasmuch as the questions argued by the other appellees will fully present the case to this Court, and because, in any event, the interests

of their clients are only incidental, they do not file any brief herein.

Respectfully submitted,

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H. H. McKeehan and
L. C. Wykoff,
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APPENDIX.

STATUTES OF OHIO.

GENERAL CODE:

SEC. 8747. By a resolution adopted by a majority of its board of directors, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, a company may change the line, or any part thereof, and either of the proposed termini, of its road. No change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed. Any subscription of stock made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change, shall be canceled at the written request of a subscriber who has not consented thereto, filed with the secretary or other chief officer of the company, within six months after such change. (R. S. 3272)

SEC. 8748. When such change is made it shall be described in such resolution, a duly authenticated copy of which, under the seal of the company, shall be filed with the secretary of state, and by him recorded, with proper reference, on the record of the articles of incorporation of the company. When so filed, such change shall be considered as made, and be as valid and binding as if the changed line had been the line originally described in the articles.

SEC. 8749. When such company has issued its mortgage bonds for the construction of its road, the record of the mortgage securing them, in each county through or into which the changed line of the road passes, shall be as effectual to create a lien upon the changed line of the road, and upon the property of the company, as if the mortgage contained a complete description of the changed line and of such property.

SEC. 8772. When a company desires to extend the line of its road beyond either of its previously designated termini, its president and directors may submit the question of such extension and change of termini to a meeting of its stockholders, to be called for that purpose by notice

published for four consecutive weeks in some newspaper in general circulation in each county through or into which the road passes. If the holders of a majority of the stock, in person or by proxy, so determine, the president and directors, or a majority of them, shall make a certificate of the fact, naming the places of the new terminus or termini of the road, and the county or counties through or into which the extended line will pass, and file it in the office of the secretary of state. Such extension then shall be held to be a part of the original line of the road.

SEC. 8806. A company may aid another in the construction of its road, by means of subscription to its capital stock, or otherwise, for the purpose of forming a connection of the roads of the companies, if the road of the company so aided will not when constructed form a competing line.

SEC. 8807. A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies. After such purchase the purchasing company shall be vested with all the rights and powers in respect to the location, construction, completion and operation of such railroad, and of branches thereto of the company from which it was purchased, including the power to acquire and appropriate property therefor, and be subject to all the duties, obligations, and restrictions of such company.

SEC. 8808. Two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with, and calculated to promote the objects for which they were created.

SEC. 8809. No such aid shall be furnished, nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent there-

to. In case of the lease of a railroad situate in whole or in part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made.

GENERAL CODE, SEC. 8834. When outside the corporate limits of a city or village it becomes necessary for the track or tracks of a steam, street, electric or interurban railroad company to cross the track or tracks of another steam, street, electric or interurban railroad company, or it is necessary within the corporate limits thereof, for the track or tracks of a steam, street, electric or interurban railroad company to cross the track or tracks of another steam, street, electric or interurban railroad company, other than within the limits of a public street or highway, unless the manner of such crossing be agreed to between such companies, the common pleas court of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party, must ascertain and define by its decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning or operating the road intended to be crossed. (99 v. 358, sec. 1)

SEC. 8835. If in the judgment of such court or judge thereof, it is reasonable and practicable to avoid a grade crossing, by its process it shall prevent a crossing at grade. In determining the mode of such crossing, no grade shall be required to exceed the established maximum or ruling grade governing the operation by motive power of that division or part of the railroad on which the improvement is to be made, without the consent of the company; nor shall either company's track be required to be placed below high water mark. (99 v. 358, sec. 1)

SEC. 8836. The court by its order, shall define the manner in which the applicant is to do or let the work for such crossing and equitably apportion the initial expense of such construction or crossing and the expense of maintenance among the parties interested. (99 v. 358, sec. 1)

SEC. 8837. A party feeling aggrieved by the decision of the court shall have the right of appeal and proceedings in error as in other civil cases. (99 v. 358, sec. 1)

SEC. 8838. Unless such companies agree upon the compensation to be paid for the land occupied by such crossing, the court shall submit that question to a jury as provided in other cases for the appropriation of private property. (99 v. 358, sec. 1)

SEC. 8839. Nothing herein shall prevent any street, electric or interurban railroad company or steam railroad company from laying additional tracks at existing crossings, under authority now existing by virtue of law. (99 v. 358, sec. 1)

SEC. 8840. When, within the corporate limits of a city, or village, it becomes necessary for the track of a steam railroad company to cross the track of another steam railroad company unless the manner of such crossings be agreed to between such companies, the common pleas court of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party shall ascertain and define by its decree the mode of such crossings which will inflict the least practical injury upon the rights of the company owning or operating the road to be crossed. If in the judgment of such court or the judge thereof, it is reasonable and practicable to avoid a grade crossing, by its process it shall prevent a crossing at grade. (97 v. 538, sec. 1-a)

SEC. 8841. In changing the grade of a steam railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark. (97 v. 538, sec. 1-a)

SEC. 8842. In its order, the court shall equitably apportion the initial expense of such construction or crossing, and the expense of such construction or crossing, and the

expense of maintenance thereof among the parties interested. A party feeling aggrieved by the decision of the court may appeal therefrom as in other civil cases. Nothing herein shall prevent any railroad company from laying additional tracks at existing crossings. (97 v. 538, sec. 1-a)

SUBDIVISION II, PUBLIC SERVICE CORPORATIONS OTHER THAN RAILROADS, CHAPTER I UNION DEPOT.

GENERAL CODE, SEC. 9160. The presidents of two or more railroad companies running railroads to the same city, or village, by the consent and under the direction of their respective boards of directors, or any number of persons, not less than five, a majority of whom shall be residents of this state, may file articles of incorporation in the office of the secretary of state for the purpose of purchasing or leasing depot grounds, and locating, constructing and maintaining a common or union station house, passenger or freight depot, or both, and terminal and connecting tracks for the use of steam railroads, or of both steam and electric railroads. Such company may acquire such depot grounds, structures, terminal and connecting tracks, by lease or otherwise. Such company may also acquire, by lease, purchase, or otherwise, and may construct, maintain and operate in connection with its terminal and station, a terminal railroad with two or more tracks connecting the railroads of one or more companies, and may also construct and maintain warehouses, stores, office buildings, hotels and other structures for the accommodation of the public, and may operate or lease said depot grounds, union station house, passenger or freight depot, tracks, terminal railroad, warehouses, stores, office buildings, hotels or other structures, or any part thereof. (108 v. Pt. 2, 1141; 106 v. 317; 101 v. 171; R. S. Sec. 3446)

SEC. 9161. The articles of incorporation shall specify:

1. The name assumed by such company;

2. The names of the railroad companies, when two or more of the incorporators are presidents of such companies;

3. The city or village where depot, terminals, connection tracks and structures to be operated in connection with such union depot companies are to be constructed;

4. The amount of capital stock necessary to obtain a site and construct, maintain and operate such depot, terminals, tracks and other structures. (111 v. 178; 106 v. 317; 101 v. 171; R. S. Sec. 3447. Eff. July 15, 1925)

SEC. 9161-1. When such company is incorporated by individuals as provided in this chapter, the organization thereof shall be in the manner provided by the general corporation laws.

The capital stock of corporations created under this chapter may be divided into common and preferred stock in the same manner and to the same extent as in the case of corporations organized under the general corporation laws. (111 v. 178, Eff. July 15, 1925)

SEC. 9162. Such articles, signed by the presidents in behalf of the railroad companies, with the corporate seals of the companies annexed thereto, or any number of persons, not less than five, a majority of whom shall be residents of this state, shall be forwarded to the secretary of state, who shall record and preserve them in his office. A copy thereof, duly certified by him, shall be evidence of the existence of such company; and thereafter it may contract and be contracted with, sue and be sued, locate and acquire rights of way and depot grounds and terminals, and appropriate so much land as is deemed necessary for such depot, tracks and terminals, and shall have all the powers given to railroads by the laws of this state, for the purpose of acquiring, constructing and operating its depot, tracks and terminals. Such company shall not be subject to the provisions of sections 9169-1 to 9169-4, both inclusive, of the General Code. (106 v. 318; 101 v. 171; R. S. Sec. 3447)

SEC. 9163. The companies whose boards of directors authorize the filing of the articles of incorporation, or assent thereto, shall each be held to own and be liable to pay an equal proportion of the capital stock, or when such union depot and terminal companies are organized by any number of persons, not less than five, the stock thereof may be required and held by such railroad companies as agree

to use said union depot and terminals, in such proportions as said railroad companies may agree upon and the provisions of the law authorizing railroad companies to enter upon and appropriate lands for depots, workshops, sidetracks and materials therefor, shall be applicable to such union depot company, whether organized by the presidents of two or more railroad companies or by not less than five individuals, as provided in this chapter; and any municipality in which such company is located, owning or having charge of any public road, street, alley, way or ground of any kind, except a public landing, may grant to such union depot and terminal company the right to construct, maintain and operate by elevated, surface and underground tracks, so far as may be necessary to carry out the purpose of said union depot and terminal company, along, over and under said public roads, streets, alleys, ways or grounds, subject to existing laws concerning crossings so far as the same may be applicable, and to erect and maintain therein the necessary tracks, piers, stays, supports and stations and the approaches for the same, and also to construct suitable terminals and way stations; provided that before making such grant said union depot and terminal company shall file with the city or village, maps showing the location and character of the construction, and said grant shall provide for such manner of construction so that the ordinary use of and traffic upon said roads, streets, alleys, ways or grounds, whether by pedestrians, vehicles, street cars or otherwise, except temporarily when necessary in the construction of such structure, shall not be interfered with; and said grant shall further provide that any tunnel construction shall not impair the stability of said roads, streets, alleys, ways or grounds, or prevent the use of any sewers, water pipes, gas pipes, and conduits used for such purposes, or for telephone or telegraph purposes in said streets, alleys, ways or grounds, except temporarily when necessary in the construction of said tunnels.

Said grant can only be made upon such terms and conditions as are agreed upon by the council of the city and the company; and said grants shall provide for its acceptance by such union depot and terminal company within the time to be fixed by the council of the municipality.

SEC. 9164. The president of each railroad company which enters into such arrangement shall, *ex officio*, be a director in the union company, unless the board of directors of such company appoint some other person as director; or when such union depot and terminal companies are organized by any number of persons, not less than five, the board of directors of such companies shall be elected by the stockholders. All questions which affect the pecuniary liabilities and expenditures, the election of officers, appointment of agents and employees, shall be regulated by the by-laws, rules and regulations of such companies, which shall not be inconsistent with the charter of the company and the general laws of the state. The board shall keep a record of its proceedings which shall be open to the inspection of the stockholders.

SEC. 9165. The board may pass by-laws, rules and regulations for its government, not inconsistent with the charter of the companies and for the regulation of the depot, depot grounds and the business thereof. It shall appoint such officers and agents as are necessary; and adopt, and post conspicuously in the passenger depot, such rules and regulations as will control the conduct of all runners, solicitors, hack men, and drivers of vehicles.

SEC. 9166. The officers and agents of the company shall have the same authority to arrest and bring to justice pickpockets, thieves, and persons who violate the public peace, or who violate any rules and regulations so posted, and persons who commit crimes and misdemeanors on the depot grounds, as by law constables possess within their respective townships.

SEC. 9167. The company controlling and operating such union depot and terminal property shall be liable to the public and persons who contract with such company, for all contracts made and damages caused by it, and for all damages, costs and expenses which arise from the fault or neglect of its officers and employees.

SEC. 9168. All laws for the protection of railroads and their property, and relating to or enforcing the duties and obligations of officers, agents, and employees of rail-

road companies to the public and to railroad companies, or to either, shall be applicable to the railroad tracks, property, officers, agents, and employees of such union company.

SEC. 9169. Any such company may borrow money for the purpose of raising means to carry out the powers conferred by the law authorizing the incorporation of union depots, without reference to the amount of stock of such company, and also issue coupons or other bonds payable to bearer, bearing interest not exceeding the highest contract rate of interest allowable in this state at the time, to be payable semi-annually; it also may mortgage its franchises, property and revenues of every kind, then owned or subsequently acquired, to secure the payment of such loan and interest, or of such bonds and interest; the stockholders thereof may jointly and severally guarantee the payment of any notes or bonds the company lawfully issues, and it may dispose of the same at such rate of premium or discount as the directors deem best for its interest, and it shall be sufficient to record any such mortgage securing such loan or bonds in the real estate records of the county where the depot and tracks are constructed.

SUPREME COURT OF THE UNITED STATES.

No. 680.—October Term, 1929.

The Pittsburgh & West Virginia Railway Co., Appellant, *vs.* The United States, et al.	Appeal from the District Court of the United States for the Northern District of Ohio.

[May 19, 1930.]

Mr. Justice Brandeis delivered the opinion of the Court.

In 1921, the Interstate Commerce Commission authorized the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, the Cleveland Union Terminals Company.[1] *The Cleveland Passenger Terminal Case*, 70 I. C. C. 659. The Wheeling & Lake Erie Railway Company had for some years owned and maintained an independent passenger station at Ontario Street in Cleveland in the line of the easterly approach to the proposed union terminal. It was apparent from the outset that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal.[2] Long negotiations culminated in a plan whereby the Wheeling consented to sell its site and become a tenant in the new terminal at an annual rental of $20,000. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission.[3]

[1]Application for this authority had previously been dismissed. 70 I. C. C. 342. The Union Terminals Company is owned entirely by the New York Central, the New York, Chicago & St. Louis Railroad Co. (Nickel Plate), and the Cleveland, Cincinnati, Chicago & St. Louis Railway Co. (Big Four).

[2]The land upon which the station was to be constructed was owned by the Cleveland Terminals Building Company. It conveyed the ground to the Terminals Company, reserving the air rights to itself. And it undertook to procure for Terminals an easement in Wheeling's site.

[3]Five contracts were executed by the Wheeling: (a) A contract with the Building Company containing an option to sell the Ontario Street site for $1,600,000; (b) a contract with the Terminals for the use of the union depot;

Thereupon, the Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station,[4] the other authorizing it to use the facilities of the union terminal and, pending its completion, to use the facilities of the station of the Erie Railroad and the tracks of the Big Four. These applications were heard together as one case. The Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, was permitted to intervene and was heard in opposition to the applications. It opposed them on the grounds that the Ontario Street station was ample for both the present and future needs of the Wheeling; that the Wheeling's applications were authorized by directors elected by the votes of stock owned in violation of the Clayton Act by the Baltimore & Ohio Railroad, the New York Central and the Nickel Plate (*Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 152 I. C. C. 721); that the contracts executed by the Wheeling were made without first securing the consent of its stockholders, as required by the laws of Ohio; that the Wheeling's directors were interested in the union terminal project and did not give the Wheeling the benefit of their unbiased judgment; that the price to be paid the Wheeling for its site was inadequate and not the best price obtainable; that the Terminals Company is a common carrier whose rates are subject to regulation; that the yearly rental to be paid by the Wheeling is unduly low and unreasonably preferential of the Wheeling; that it is therefore subject to be increased by the Interstate Commerce Commission; and that, if increased so as to eliminate the preference, it would confessedly be much more than the Wheeling could afford to pay and would imperil its financial condition.

(the provisions of this contract are set out in detail in the report of the Commission); (c) a contract with the Erie Railroad for the temporary use of its Superior Avenue station pending completion of the union terminal; (d) a contract with the Big Four for the temporary use of its tracks in order to reach the Erie's station; (e) a contract with the Terminals for reimbursement by it of the amounts which the Wheeling would have to pay under its contracts with the Erie and the Big Four.

[4]This authority was also sought from the Public Utilities Commission of Ohio, but the application was dismissed for want of jurisdiction and the order of dismissal was affirmed by the Supreme Court of Ohio. *Pittsburgh & West Virginia Ry. Co.* v. *Pub. Util. Comm.*, 120 O. S. 434. See also *Wheeling & Lake Erie Ry. Co.* v. *Pittsburgh & West Virginia Ry. Co.*, 33 F. (2d) 390.

The Commission held that the violation of the Clayton Act was immaterial since the election of the directors occurred prior to the Commission's finding of violation and the finding was not made retroactive; that it lacked jurisdiction to pass upon the alleged violations of Ohio law or upon the adequacy of the price agreed to be paid for the Wheeling's site; that under paragraph (4) of § 3 of the Interstate Commerce Act, the agreed rental for the Wheeling's use of the union station was not subject to be increased by it; and that in view of all the circumstances, the rental was not unduly preferential of the Wheeling. It found that public convenience and necessity would be served by the granting of both applications; and accordingly issued its certificate as prayed for. *Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.*, 154 I. C. C. 516.

The Pittsburgh & West Virginia then brought this suit in the District court for northern Ohio, eastern division. It joined as defendants the Wheeling, the Erie, the Big Four, the Terminals Company, the Building Company, the Interstate Commerce Commission and the United States. The purpose of the suit, as stated in the complaint, was two fold: first, to enjoin the Wheeling from abandoning its Ontario Street station and from performing its contracts with the other defendants; secondly, to set aside and annul the order of the Interstate Commerce Commission granting the certificate of public convenience and necessity. Separate relief was prayed for accordingly. As against the Wheeling, the prayer was founded on the several grounds advanced before the Commission. As against the United States and the Commission, on the additional ground that the order was based on erroneous conclusions of law; to wit, that the Commission had no jurisdiction to pass on the adequacy of the price to be paid for the land and on the alleged violations of the laws of Ohio; that the Wheeling's directors were competent to act for it in this matter; and that the rental agreed to be paid by the Wheeling for the use of the union terminal facilities was not subject to be increased by the Commission.

The Pittsburgh moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the District Judge called to his assistance two additional judges pursuant to the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219-20. By consent of the

parties, the case was then heard, as upon final hearing;[5] and the court entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors and the other grounds of attack on the Wheeling's action were not properly before it as a three judge court. But, since diversity of citizenship existed and the district judge concurred in the judgment, the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its decision on them as the decision of a single judge. *Pittsburgh & West Virginia Ry. Co.* v. *United States,* — F. (2d) —. Appellant did not avail itself of this privilege but prosecuted a direct appeal to this Court from the whole decree. It repeats here the several grounds of attack urged before the district court. We have no occasion to consider the merits of the controversy. For, we are of opinion that appellant had no standing to bring this suit as one to set aside an order of the Commission; and that, insofar as the suit may be treated as one within the general equity jurisdiction of the District Court, we have no jurisdiction on a direct appeal to review its decision.

First. The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside

[5]When the motion for a preliminary injunction was reached for hearing, the court formally "announced that the hearing, either temporary or as final, would be considered as involving two classes of questions: First, those involving the validity of the order of Interstate Commerce Commission as dependent upon the record before it and thus involving questions of public interest in which the United States and Interstate Commerce Commission are interested; and second, those involving all other grounds of attack upon the proposed action of the defendant [the Wheeling] and in which neither the United States nor the Interstate Commerce Commission was interested; and that the hearing would proceed upon the first class of questions involved; that the court would then decide whether to dispose of the matter upon those questions or to continue the hearing upon the other questions. . . . Thereupon . . . the record of the proceedings and testimony before the Interstate Commerce Commission . . . was received . . . upon the first class of questions, and the extent of its admissibility on the second class . . . reserved until the hearing of that branch of the case." But no further hearings were held. Appellant claimed the right to introduce additional evidence and excepted to the above ruling of the court. Compare *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442. Appellant's consent to final submission was subject to the above claims.

the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son* v. *United States*, 281 U. S. — (No. 19, decided April 14, 1930). Nor does the mere fact that its lines connect with those of the Wheeling near the City of Pittsburgh, Pennsylvania,[6] entitle it to bring the suit. Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it as carrier.[7] Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another,[8] the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits.

Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are

[6]The Pittsburgh's lines connect with those of the Wheeling at Mingo Junction and at Pittsburgh Junction, Ohio.

[7]The Pittsburgh contends also that it is seeking to acquire control of the Wheeling and that the Interstate Commerce Commission has allocated the Wheeling and the Pittsburgh to one system in its plan for the consolidation of the railroads. But these vague speculative interests are clearly insufficient to give the Pittsburgh an independent standing in this suit.

[8]See *Control of Big Four by N. Y. Central*, 72 I. C. C. 96; *Nickel Plate Unification*, 105 I. C. C. 425; *Control of Cincinnati, Indianapolis & Western R. R.*, 124 I. C. C. 476; *Unification of Southwestern Lines*, 124 I. C. C. 401; *N. Y. Central Unification*, 150 I. C. C. 278; *Lease of Louisville, Henderson & St. Louis Ry.*, 150 I. C. C. 741; *Control Erie R. R. & Pere Marquette Ry.*, 150 I. C. C. 751; *Denver & Rio Grande Western Reorganization*, 90 I. C. C. 141. Compare *Stock of Baltimore & Ohio R. R.*, 131 I. C. C. 27.

faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. Compare *Cleveland, etc., Ry. Co.* v. *United States,* 275 U. S. 404, 414; *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 181. It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. The case at bar is wholly unlike *The Chicago Junction Case,* 264 U. S. 258, 269, where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective. Here, such joinder is unnecessary for that purpose. Moreover, grounds for general equitable relief, obviously, cannot give the Pittsburgh a standing in this Court on direct appeal under the Urgent Deficiencies Act, when it had no right to bring suit under that Act.

While there was no occasion for the district court to consider the merits, the bill was properly dismissed. The decree is affirmed without prejudice to the right, if any, of the Pittsburgh to enjoin in a proper proceeding action by the Wheeling.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.